



*The EU defence market:  
balancing effectiveness with responsibility*

Edited by Alyson JK Bailes & Sara Depauw

*Conference Report*

## COLOPHON

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# Introduction

*2009 was a milestone in the creation of a European defence market. European member states adopted the EU defence package which is meant to open up national defence markets in the EU in order to create a European level playing field. At the same time, the EU is strengthening its common policy to control trade in dual-use items and conventional weapons, in order to prevent arms transfers that might fuel armed conflicts and terrorism. On the occasion of the Belgian EU presidency during the second half of 2010, a conference was organised in the Flemish Parliament to evaluate recent developments in the field of arms trade and arms production. The central question of the conference was to what extent an economic-oriented policy – aimed to promote Europe’s competitive stake in defence production, trade and high technology – is or ought to be combined with a preventive arms export control policy. Can the EU pursue a rationalised defence market without undermining its goals and legitimacy related to conflict prevention? In search of a healthy balance between effectiveness and responsibility, this conference report aims to contribute to the current debate on the development of a European defence market and the EU’s armaments policy.*

Traditionally, the control of arms production and arms trade is closely linked to national sovereignty. States have developed national defence industries to provide the state with defence material and avoid reliance on other states for armament supplies. Reflecting a shared interest in controlling trade in strategic goods (dual-use items and military equipment), however, national authorities have agreed in international fora on common export control policies.<sup>1</sup> The role of the EU used to be limited in this policy area, but its influence has gradually increased. The first initiatives of the EU to set up a harmonised export control policy for trade in both military and dual-use items were taken in 1991-1992.<sup>2</sup> For military equipment, a European arms export control regime was developed as part of the Common Foreign and Security Policy (CFSP). EU policy on trade in dual-use items related to Weapons of Mass Destruction, on the other hand, formed part of the EU’s common trade policy. While limiting intra-EU trade in dual-use items was deemed to be inconsistent with the principles of the common market, a common export control policy was considered necessary to reconcile this approach with the important dictates of non-proliferation. Thus the EU now regulates both intra- and extra-EU trade in such products and technology by means of a directly applicable regulation.<sup>3</sup> As to conventional weapons, under CFSP the European Union has taken a series of steps culminating in a common position on arms exports, whereby common guidelines are applied and information exchanged, but national governments remain competent for adopting and executing the relevant legislation.<sup>4</sup> By mid-2009, member states had also agreed on EU directives that bring intra-EU trade in military equipment increasingly, if not totally, within the sphere of Community competence and the Single Market.<sup>5</sup>

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- 1 See international control regimes such as the Wassenaar Arrangement, Nuclear Suppliers Group, Zangger Committee, Australia Group, Missile Technology Control Regime, initiatives of the UN, OSCE, a.o.
  - 2 Conclusions of the Luxembourg European Council (28 and 29 June 1991), DOC/91/2, RAPID database, 29/06/1991.
  - 3 Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, Official Journal of the European Union L 134, 25 May 2009, p. 1-269.
  - 4 Council common position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, Official Journal of the European Union L 335, 13 December 2008, p 99-103.
  - 5 Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community, Official Journal of the European Union, L 146, 10 June 2009, p 1-36.

The EU's policy on arms export controls cannot be isolated from its broader armament policy and current developments on the defence market. Export controls are deemed necessary to protect peace and security, but they also hamper the export of defence material and entail a substantial administrative and financial burden. Although the necessity of controlling this trade is challenged neither by the EU authorities nor by industry, European defence companies have complained about the fragmented national export control legislation in European member states. A transnationally organised industry, under pressure to deepen cross-border collaboration, is encumbered by 27 different licensing systems and sets of regulations on arms trade. Given that transfers of equipment, components and know-how between defence companies are increasing, and that companies are more dependent on exports to cover their production costs, the need for a unified legal framework is strongly felt. The emergence of the Common Security and Defence Policy (CSDP, formerly ESDP)<sup>6</sup> and the establishment of the European Defence Agency (EDA)<sup>7</sup> have further strengthened the call for a European defence equipment policy attuned to Europe's own needs and interests, and for the reduction of obstacles to transferring defence equipment within the EU.

CSDP has provided the EU since 2000 with an instrument for military contributions to crisis management, whether within the EU's own 'strategic space' or further afield. What kind of crises would fall under the scope of CSDP is undefined and mainly depends on the willingness of member states to intervene. Thus far, EU military deployments have been few and other crises have been handled by police and other civilian interventions, or by more traditional diplomatic and humanitarian means.<sup>8</sup> However, ever since the British-French Summit in Saint-Malo (1998), the aims and targets of ESDP/CSDP have included boosting Europe's collective military capacities notably by building up the hardware and technical systems most vital for long-range deployments.<sup>9</sup> The European Defence Agency (EDA) was established in 2004 to coordinate European armaments cooperation and to support the improvement and compatibility of member states' military capabilities, in view of these CSDP needs as well as of Europe's stake in developing competitive high technologies.

The European Commission has made efforts in parallel and in synergy with the EDA to strengthen the European defence equipment market and support the development of an EU-wide Defence Technology and Industrial Base. The rationale for a reform of nationally oriented defence markets is not only to improve military interoperability and cost-efficient production of military equipment in the light of shrinking national defence budgets in Europe, but also to stimulate competitiveness in the wider world – a concern of the European Commission's overall security and industrial policy. For years, the European Commission has challenged the interpretation of former art. 296 TEC (art. 346 TFEU), which member states have used to exclude military equipment from Community rules on competition and procurement and to preserve national prerogatives instead. The Commission has however insisted that equal competition and free intra-EU trade would stimulate a rationalised

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6 See European Union external action: CSDP, <http://www.consilium.europa.eu/showPage.aspx?id=261&lang=EN>, consulted on 4 February 2011.

7 See EDA, <http://www.eda.europa.eu/>, consulted on 4 February 2011.

8 Howorth, J. (2007), *Security and defence policy in the European Union*, New York: Palgrave Macmillan, p 10.

9 Joint Declaration on European Defence issued at the British-French Summit (Saint-Malo, 4 December 1998), <http://www.ena.lu/>, consulted on 30 January 2011.

production process and create opportunities for a competitive European defence industry. Most recently, it introduced the so-called European defence package which contains one directive on defence and security procurement<sup>10</sup> and another on intra-EU trade in defence equipment<sup>11</sup>. As already noted, both directives were adopted by mid-2009, constituting an important step towards a more competitive European defence market. The defence package is, however, not the Commission's only ongoing initiative.<sup>12</sup> Its Framework Programmes for research funding are also designed inter alia to strengthen Europe's comparative advantage in high-tech security markets.<sup>13</sup> Another related issue that deserves mentioning is the interest of the European Commission in the shifting boundaries and interplay between security and defence technologies.<sup>14</sup> Today, companies are often active in both and a single technological advance could have applications in both external defence and internal security, perhaps together with further civilian uses. Producers would argue that for Europe to have R+D and collaboration strategies covering these fields, which stretch beyond the competences of the EDA alone, could reveal new scope for efficiency, cost-saving and appropriate control measures as well as global competitiveness.

The policy dilemma lies, however, in the fact that top-down and market incentives for a flourishing defence market may run up against the confines of a responsible European stance on arms and export controls, or conversely may undermine 'restraint' as an aspect of European strategy and values. The institutions and policies that stimulate competitiveness in the security and defence market do not address the question of where these products will eventually end up and what damage they may do. Although both policies – the development of the European defence market and the European export control regime – are highly interconnected, the way in which one influences the other is hardly ever debated.

This report aims to fill that gap by exploring the delicate balance between security ambitions and economic aspirations in a policy area where both economic and security interests are at stake, and where one may all too easily jeopardize the other. As one keynote speaker during the plenary session put it: "export controls are the sharp end of foreign policy and the cutting edge of industrial policy". To people concerned with a strong defence market, the rationale behind EU export control policy often remains unclear. "Should an EU export control policy be based on morality, jobs, security? The debate is lacking". More exactly, even if the debate is taking place among governments and NGOs, the message may not be reaching the other – industrial, financial and technical - side of the divide. From the perspective of export controls, or of wider peace and conflict management endeavours,

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10 Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the field of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, *Official Journal of the European Union*, 20 August 2009, p 76-136.

11 Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community, *Official Journal of the European Union*, 10 June 2009, p 1-36.

12 For more information on the European defence package, see European Commission, DG Enterprise and Industry, [http://ec.europa.eu/enterprise/sectors/defence/documents/index\\_en.htm](http://ec.europa.eu/enterprise/sectors/defence/documents/index_en.htm), consulted on 4 February 2011.

13 For more information, see CORDIS, [http://cordis.europa.eu/home\\_en.html](http://cordis.europa.eu/home_en.html), consulted on 4 February 2011.

14 See e.g. Instituto Affari Internazionali, Manchester Institute of Innovative Research & Institut des Relations Internationales et Stratégique, (2010), *Study on the industrial implications in Europe of the blurring of dividing lines between security and defence*, European Communities, 373 p.



the question that naturally follows is whether we have thought through the implications and real costs of a flourishing defence sector in terms of security, stability, prevention of armed conflicts and non-proliferation. Without a clear vision on the legitimacy of exporting EU defence and security equipment to third countries, the growth of a European defence market might even be considered to challenge the image of the EU as a normative power.

In this report, contributors offer in-depth analysis of the rationale for a European defence market and the modalities of its realisation. The texts were prepared for and are informed by discussions that took place in a conference at the Flemish Parliament in Brussels in November 2010. The overarching question asked was to what extent an economics-oriented policy – aimed to promote Europe’s competitive stake in defence production, trade and high technology – is and ought to be combined with a preventive arms export control policy. The lively discussions confirmed that this policy field raises questions about underlying political choices shaping the whole nature of the EU as a global actor.

We would like to thank all the partners in this conference - the Flemish Peace Institute, the Strategic Goods Control Unit of the Flemish Department of Foreign Affairs, the Groupe de Recherche et d’Information sur la Paix (GRIP), the Stockholm International Peace Research Institute (SIPRI), the Flemish Parliament and the Flemish Government - for their support. We would also like to thank all chairs and speakers at the conference, including Giles Merritt, Michael E. Smith and Pierre-Arnaud Lotton who shared their inspiring thoughts at the plenary session. Special thanks go to the contributors to this report,<sup>15</sup> to Alyson Bailes for her warm support during all phases of the process, and to all who attended the conference for the lively debate.

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15 The authors of chapters and papers in this collection have adopted slightly different approaches to referencing and structuring their texts, which we have not attempted to standardize in the belief that they will present no impediment to the reader.



# Section 1: The rationale for a common defence market revisited: political and economic aspects

This section reviews the patterns of arms production and procurement in the European Union and analyses how the European Union has become more deeply engaged in this sphere due to its relevance for CFSP, CSDP and European research and industrial policies. It will offer an insight into the roles of the European Commission and the European Defence Agency (EDA) in shaping a European defence market. First and foremost, the question is posed whether there is such a thing as a 'European' defence market, and if so, in what way it distinguishes itself from other markets. Given the global organisation of defence companies and defence programmes, one might ask whether defence markets can be defined by geographical boundaries. Do companies that we consider European actually think of themselves as European, or is a European defence market superseded by a globalised one?

Increasing attention and means are being devoted to the development of security equipment and technology. The divisions between security and defence, between internal and external security, or between civilian and military operations, are these days not clear-cut. From a market perspective, the merging of security and defence in national and European homeland security and defence policies offers new opportunities to broaden the market for technological developments and strengthen competitiveness in a high-tech environment. The European Commission – a driving force behind the economic development of a competitive defence market – tends to support these ambitions. The first chapter of this section, by Jocelyn Mawdsley, offers valuable insights into the degree to which the market in security and defence items is intertwined and what the legal consequences of this may be in terms of export controls. To what extent should non-military security equipment and technology be regarded as strategic goods that should be subject to control, and are there any legal and/or normative boundaries to funding for R&D and trade in security technologies? Dr. Mawdsley analyses whether the merging of security and defence in the defence market is real, problematic, or useful.

The drive to create a European defence market has been steered both by economic imperatives and by political ambitions in the field of CFSP. The latent question is whether the development of a European defence market will affect the role of the European Union as a global power and if so, whether it will change the character of its power. Does the EU risk losing its claim to be a normative power, or do we need a stronger defence capacity in order not to lose credibility as an actor in international politics? The second chapter, by Dr. Herbert Wulf, elaborates on the philosophical foundation, the moral grounds and the normative power of the EU in this connection. It questions whether a common EU defence market is likely, given the national interest of member states, and whether a stronger defence market would benefit the common foreign and security policy of the EU.

A third chapter, by Santiago Eguren Secades, offers an overview of the tasks assigned to the EDA and the initiatives that have been taken in order to strengthen the competitiveness of European defence companies. It offers a critical assessment of the role of EDA and its prospects for fulfilling its goal; namely to create a competitive European defence equipment market and to strengthen the European Defence Technological and Industrial Base.



# Towards a Merger of the European Defence and Security Markets?

Dr. Jocelyn Mawdsley, Newcastle University

Since the terrorist attacks of 9/11 much attention has been paid to the United States' homeland security programme, but it has been less widely noted that the EU has also developed a series of initiatives aimed at enabling the development and production of security technologies, focused around the security research priority of the EU's Seventh Framework Programme (FP7). These policy initiatives are slowly creating an identifiable security market within the EU. The question underpinning this chapter is the extent to which this is a distinct entity, or whether it is in fact simply an offshoot of the well-established defence market.

This chapter makes the assumption that security refers to the homeland security agenda developed in the post 9/11 era. It is difficult, however, to completely separate defence and security issues even in this limited time period. Defence is sometimes viewed as being military and focussed on external security, whereas contemporary homeland security is predominantly internally focussed and civilian. The reality is that divisions are not clear cut. Policing, intelligence and border control customs vary considerably within the EU as does the role of the military in internal security. States like Britain and France have merged both concepts in recent strategic reviews (the French 2008 White Book and the British 2010 Strategic Defence and Security Review). For some commentators, it is merely a matter of semantics. Tim Robinson, senior vice-president of Thales' security division, is quoted as commenting on the changing homeland security market: "I see a shift in emphasis and an increasing balance between what we see as defence and homeland security. 'Security' is a more politically acceptable way of describing what was traditionally defence."<sup>1</sup> For others, the blurring of the boundaries of military and civilian is a worrying development with concerning implications for civil liberties in Europe.

This chapter aims to offer an analysis of the interconnectedness (or otherwise) of the security and defence markets in the European Union (EU) by considering firstly, how the security market has come into existence and then questioning whether providers and products differ substantially between security and defence. It will then ask whether security products are subject to controls as strategic goods and whether these controls are fit for purpose. It will conclude by discussing whether the merging of security and defence markets is real, problematic or useful.

## The Beginning of an EU Security Market?

The first analytical problem facing the researcher keen to consider the EU security market is one of definition. What is the security market and what firms are involved? It is not entirely clear. Ecorys et al (2009) emphasise this difficulty in their report for DG-Enterprise and Industry on the competitiveness of the security industry in Europe. Their model for scoping the sector differentiates between the traditional security market, based around the largely private provision of protection for persons and property, and the market that is responding to 'new' security threats such

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1 Euractiv, Critical Infrastructure (13 December 2006), <http://www.euractiv.com/en/security/critical-infrastructure/article-140597> consulted 7 March 2011.

as terrorism, organised crime, cyber-crime and protection from and response to major catastrophes.<sup>2</sup> This latter market is immature, arguably only having been called into existence since 9/11 and the subsequent US launch of a major Homeland Security programme. It is noticeable, for example, that prior to the EU initiative on security research, only Sweden and Austria considered security research and development worth special funding despite the high entry costs for firms looking to enter the market.<sup>3</sup> The demand side is still highly fragmented. The nature of this market and the firms operating within it will be shaped by early funding programmes, so it is worth taking some time to consider the genesis and character of the EU security research programme, which has the aim of creating such a market within the EU.

DG-Enterprise and Industry itself claims on its website to trace the evolution of security research to 2003,<sup>4</sup> citing the European Security Strategy as the rationale for Commission activity to increase European security. Concrete development of what became security research seems, however, to date from July 2002 with the report of the Strategic Aerospace Review for the 21st century, or STAR 21, and the Commission's response.<sup>5</sup> STAR 21 was somewhat controversial. The report was the product of an unusually high-level working group of European aerospace industry figures, European Commissioners, Javier Solana and Members of the European Parliament. It emphasised the view that European civil and defence aerospace were both complementary and interdependent and needed considerable investment to match the American competition. The report had two particular priorities: (1) rapid progress in developing a more coherent European market in defence equipment; and key to this paper, (2) major improvements to the structure of European research and technology in civil aeronautics, defence and space. Another 2002 document is also worthy of note: the Strategic Research Agenda for aeronautics released by the Advisory Council for Aeronautics in Europe (ACARE).<sup>6</sup> Like STAR 21, the ACARE report also pointed out that defence companies in the United States are now spending considerably more on research than their European Union counterparts. A unifying theme of the two reports was the stress laid on the belief that technological innovation in the defence and aerospace fields was key to wider economic success for the EU.

According to DG-Enterprise and Industry, the next key document for the development of security research was the March 2003 Commission Communiqué 'Towards an EU Defence Equipment Policy'. Under the heading *towards a more coherent European advanced security research effort*, the Commission called for increased coordination of security research. It said it would ask national administrations, the business community and research institutions their opinions on what a European agenda for research in this field should look like and would seek "to launch a preparatory action to coordinate such research at the EU level, focusing on a limited number of concrete technologies linked to the Petersberg tasks".<sup>7</sup> At this stage the thinking seemed relatively clear; the Commission was attempting to move into defence research funding as a way of supporting the defence firms it deemed technologically vital to economic competitiveness. One Commission

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2 Ecorys et al, Document ENTR/06/054, *Study on the Competitiveness of the EU Security Industry*, Study produced for DG-Enterprise and Industry within the Framework Contract for Sectoral Competitiveness Studies, Brussels, DG-Enterprise and Industry, 15 November 2009.

3 Interviews carried out with German officials in 2008.

4 [http://ec.europa.eu/enterprise/security/documents\\_en.htm](http://ec.europa.eu/enterprise/security/documents_en.htm) consulted on 7 March 2011.

5 European Commission, STAR21 Strategic Aerospace Review for the 21st Century, Brussels, European Commission, July 2002.

6 Advisory Council for Aeronautics Research in Europe, Strategic Research Agenda, Brussels, ACARE, October 2002.

7 European Commission. COM (2003) 113, *European Defence - Industrial and Market Issues - Towards an EU Defence Equipment Policy*, Brussels, European Union 11 March 2003.

official went on the record to say “The EU’s framework program supports dual-use research in all these areas, so it would make sense to bump things over into the purely military realm... The important thing is to set the precedent”.<sup>8</sup> In May 2003, meanwhile, another Commission official seemed to suggest that a major reorientation of the research budget was planned, saying that the development of a stronger European defence identity implied, “a more flexible use of EU research money in favour of defence-orientated projects”.<sup>9</sup>

This however was complicated by the decision in June 2003 of the European Council to launch an intergovernmental agency, to be known as the European Defence Agency (EDA), which was finally agreed in a July 2004 joint action. The EDA was specifically tasked with coordinating EU defence research and development. It was at this stage that the Commission documents became somewhat ambiguous as they tried to find a way to continue with their plans without openly funding defence research, which they had no legal basis for doing. The Commission’s 2004 communiqué and decision, which launched a preparatory action in the field of security research (PASR), drew inspiration from the 2003 European Security Strategy and the priorities were rather broad.<sup>10</sup>

PASR was to spend 65 million Euros over three years and served as a pilot phase for the Commission’s broader agenda of establishing a separate security research programme to facilitate an EU security culture. PASR funded projects in the following priority mission areas:

- Improving situation awareness
- Optimising security and protection of networked systems
- Protecting against terrorism
- Enhancing crisis management
- Achieving interoperability and integrated systems for information and communication.

PASR is noteworthy as it was a particularly large preparatory action, operating for the maximum budget (€65 million) and time span (3 years) permitted in the relevant procedural framework. Although dubbed a research programme and initially launched by DG-Research, the funding approved for PASR was provided under the then Article 157 of the EC Treaty (Title XVI -Industry) rather than under Title XVIII (Research) as ordered in Article 163(3) of the Treaty. Later the PASR group was moved into DG-Enterprise and Industry, which also manages the security research priority in the 7<sup>th</sup> Framework Programme. There was no question of PASR failing. The first call for projects had hardly been made before the decision of whether to continue with a security research priority in the 7<sup>th</sup> Framework Programme was taken, in a September 2004 communiqué called ‘Security Research: The Next Steps’.<sup>11</sup>

The Group of Personalities whom the Commission asked to produce a report on security research was heavily biased towards defence industry and defence officials, and had very little representation from any users of civilian security research. Unsurprisingly, their report contended that there should be no division between military and civilian research and argued for €1 billion per year (minimum) to be spent on security research, thus helping to meet the Lisbon target of 3% of

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8 Tigner, B, EU moves to directly fund research, *Defense News*, 6 January 2003.

9 Tigner, B, EU to shift research funds into defense: move mixes national, EU money for global security, *Defense News*, 5 May 2003.

10 European Commission, COM (2004) 72 final and Decision 2004/213/EC, On the implementation of the Preparatory Action on the enhancement of the European industrial potential in the field of Security research, Towards a programme to advance European security through Research and Technology, Brussels, European Union, 3 February 2004.

11 European Commission, COM (2004) 590, Security Research: The Next Steps, Brussels, European Union, 7 September 2004.

GDP spent on research.<sup>12</sup> Its primary claim for doing this appeared to be that as the US has chosen to invest this much in Homeland Security so must the EU, to ensure that US industry should not have a competitive advantage – scarcely a particularly convincing argument given the widespread domestic criticism of the USA’s own homeland security research programme.

The Commission’s communiqué ‘Security Research: The Next Steps’ committed it to setting up a European Security Research Advisory Board (ESRAB) “to advise on the content of the ESRP and its implementation, paying due attention to the proposals of the Group of Personalities”. ESRAB should include “experts from various stakeholder groups: users, industry, and research organizations”.<sup>13</sup> The research priority eventually agreed within the 7<sup>th</sup> Framework Programme maps fairly closely onto the findings of the ESRAB report, with the following activities being funded (€1.4 billion over the lifetime of FP7):

- **“Increasing the security of citizens** - technology solutions for civil protection, bio-security, protection against crime and terrorism;
- **Increasing the security of infrastructures and utilities** - examining and securing infrastructures in areas such as ICT, transport, energy and services in the financial and administrative domain;
- **Intelligent surveillance and border security** - technologies, equipment, tools and methods for protecting Europe’s border controls such as land and coastal borders;
- **Restoring security and safety in case of crisis** - technologies and communication, coordination in support of civil, humanitarian and rescue tasks;
- **Improving security systems integration, interconnectivity and interoperability** - information gathering for civil security, protection of confidentiality and traceability of transactions;
- **Security and society** - socio-economic, political and cultural aspects of security, ethics and values, acceptance of security solutions, social environment and perceptions of security;
- **Security research coordination and structuring** - coordination between European and international security research efforts in the areas of civil, security and defence research.”<sup>14</sup>

The research is mission-orientated and in many ways is development-orientated, rather than the type of “blue skies” research funded under the priorities managed by DG-Research. Some projects in fact seem to be more about procurement than research and development. A good example of this is the Seabilla project: according to one firm involved, Mondeca, “Seabilla will define the architecture for cost-effective European Sea Border Surveillance systems; integrate space, land, sea and air assets, including legacy systems; apply advanced technological solutions to increase performances of surveillance functions; as well as develop and demonstrate significant improvements in detection, tracking, identification and automated behaviour analysis of all vessels, including hard to detect vessels”<sup>15</sup>. Interviews with DG-Enterprise officials in 2008 made it clear that they were predominantly interested in running the priority as a internal security market creation scheme, to push for standardisation of security practices and procedures across the EU (through end-user involvement in all projects) and thus to increase the competitiveness of the EU security industry.

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12 European Communities, EUR 21110, Research for a Secure Europe: Report of the Group of Personalities in the field of Security Research, Luxembourg, Office for Official Publications of the European Communities, 2004.

13 European Commission, COM (2004) 590.

14 [http://cordis.europa.eu/fp7/cooperation/security\\_en.html](http://cordis.europa.eu/fp7/cooperation/security_en.html) consulted on 7 March 2011.

15 [http://www.mondeca.com/index.php/en/research/projects/seabilla\\_european\\_union\\_ict\\_fp7\\_sec\\_2009\\_1\\_2010\\_2014](http://www.mondeca.com/index.php/en/research/projects/seabilla_european_union_ict_fp7_sec_2009_1_2010_2014) consulted on 7 March 2011.



## The EU Security Market Features: Supply Side

Ecorys et al have identified three types of supplier in the security market: the traditional security industry supplying general security applications e.g. protective clothing, access control, fire detection, CCTV; the security-orientated defence industry, based on applying defence technologies to security problems or where defence firms have acquired or adapted civilian technologies for use in the security market; and finally, new entrants either from other civilian industrial sectors spinning in their technologies for security use or start-up companies.<sup>16</sup> However, within the high end of the 'new security' market, as fostered in the EU Security Research programme, Ecorys et al see a fairly limited involvement of the traditional security firms, except in some surveillance technological areas. They also point to the nature of the demand side in this high-end market as being characterised by a limited number of customers, predominantly national governments, as they are the only legitimate users of the products, and the specificity of their demands, which combine to produce a corresponding concentration in the supply of security equipment.<sup>17</sup> They also argue that at the high end of the new security market there are significant barriers to entry relating to

- High investment costs relating to technological development and then the transition to the market;
- High costs in securing markets (lobbying, marketing and government relations) – this is related to 'the need to 'educate' clients on technological possibilities and choices.<sup>18</sup>

This means that there is little involvement by small and medium-sized enterprises (SME), and when SMEs do develop technologies, they tend to either be acquired by the large equipment integrators or licensed out to them to develop the technology.

Does this add up to a convergence of security and defence providers? If one takes the security market as a whole, then no, the spectrum of suppliers is still relatively diverse. However, when the high end of the 'new security' market, as supported by the EU security research programme, is considered then the picture is rather different.<sup>19</sup> Here there is a concentration of defence contractors who have entered the security market by acquiring companies specialising in areas such as x-ray scanning, biometrics and mobile communications, or by applying existing defence technologies to internal security problems. Recent noticeable acquisitions in 2010 include French defence and aerospace group Safran's purchase of L-1 Identity Solutions biometric, identity and recruitment operations for around €1 billion, which will make Safran the world's biggest biometric identification company. BAE also strengthened its profile in the security sector with the acquisition of L-1 Intelligence Services group. Ecorys et al noted that firms originating in the civilian market were major players in very few sectors e.g. Motorola in secure communications.<sup>20</sup> Looking at the history of the security research programme, this is perhaps unsurprising. This tendency looks likely to be strengthened by the Commission's response to the European Security Research and Innovation Forum report, when it notes the need to strengthen the complementarity and cooperation between defence and civilian technologies, and to increase its mandate to include the external dimension of security in future research programmes.<sup>21</sup>

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16 Ecorys et al, Document ENTR/O6/O54.

17 Ibid.

18 Ibid p. iv.

19 The area of European maritime security is the only sector at the high-end of this market to show much diversity in suppliers according to Ecorys et al.

20 Ibid.

21 European Commission, COM(2009) 691 final, A European Security Research and Innovation Agenda – Commission's initial position on ESIRIF's key findings and recommendations, Brussels, European Union, 21 December 2009.

The European Commission has also used the security research programme to engage in cooperation with the European Defence Agency. Two projects in particular are seen as success stories by the EDA and the Commission.

- Software Defined Radio which has applications both for military use and use by first responders (police, fire service and so forth).
- a project on the insertion of Unmanned Aerial Vehicles into civil airspace.<sup>22</sup>

This ad hoc cooperation led to the May 2009 decision by the European Defence Ministers to task the European Defence Agency to establish a European Framework Cooperation for Security and Defence together with the European Commission with the aim of “maximising complementarity and synergy between defence and civil security-related research activities”.<sup>23</sup> The EDA has identified situational awareness (sensor technologies, command and control of networked assets) as an area for cooperation.<sup>24</sup> Discussions are also underway about the possibility of including defence research in the 8th Framework Programme. All of these developments look likely to intensify the patterns of provision emerging in the new security market.

### Is there a Convergence of Military and Non-Military Products supplied to the market?

It is true to say that there has been some blurring of the line between military and non-military products supplied to defence and security end-users. This is partly due to some convergence in their missions - e.g. counter-insurgency has commonalities with counter-terrorism - but also because of the dynamics of technological innovation. However, it is important not to overstate this case. While there are some products that are of interest to both military and non-military users such as secure communications, and surveillance technologies like unmanned aerial vehicles and sensors, there still is a large amount of difference between military and non-military products.<sup>25</sup> Aircraft-carriers, fighter jets and advanced missile technology for example remain clearly military products. Stankiewicz et al insist that this division will be maintained, as ministries of defence will be careful to retain control over and privilege investment in some defence technologies for reasons of national security and security of supply.<sup>26</sup> Where there is less difference is in the technologies underpinning the products. If we consider the STACCATO taxonomy of technologies of interest to security and defence users, then James argues that there are still several technology classes that “are essentially defence-specific and have limited (or no) application outside in other fields (namely, 102 – Materials for deterrence; 103 – Stealth materials and technologies; and, 105 – Energetic materials).”<sup>27</sup> Most defence and civilian security products however are heavily reliant on a wide range of generic technologies.

While during the Cold War, it was assumed that defence technologies were the most advanced, spinning out into commercial applications but with the technology itself essentially secure, today as Stankiewicz et al argue:

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22 James, A (2009a), Defence and Security R & D in Europe: SANDERA Background Report: [www.sandera.net](http://www.sandera.net) consulted 7 March 2011.

23 Council of the European Union, 2943rd External Relations Council meeting, Conclusion on European Security and Defence Policy (ESDP), Brussels, 18 May 2009.

24 James, A (2009a).

25 In addition obvious areas of overlap are in non-technological areas such as uniforms, protective clothing, logistics etc.

26 Stankiewicz, R et al (2009), Knowledge Dynamics Scoping Paper, SANDERA Scoping Paper [www.sandera.net](http://www.sandera.net) consulted 7 March 2011.

27 James, A (2009a) p. 7.

“The end of self-sufficiency is indeed a pervasive phenomenon. It affects firms, industries, sectors and countries. The vertically-integrated techno-military complexes are no longer secure sources of most relevant technologies. Defence and civil security products rely heavily on generic, globally available technologies not least information and communications technologies (ICTs). Advances in microsystems, nanotechnology, unmanned systems, communications and sensors, digital technology, bio- and material sciences, energy and power technologies and neuro-technologies have all been identified as important for the defence sector and most if not all can be characterised as generic technologies.”<sup>28</sup>

In other words, the Cold War defence innovation model is breaking down. Because both military and non-military security products draw on generic technologies, this does blur the boundaries around both knowledge production and the application of the technologies not just between military and non-military security products, but vis-à-vis wider civilian and commercial technology innovation.<sup>29</sup> Moreover, the fact that many defence and security products draw on commercially available technologies, particularly ICT technologies, mean that these technologies are also potentially available to hostile users if they have or acquire the systems integration capacities to utilise them. This means that there are new challenges for those concerned about defence and security technology proliferation.

### Security Products and Strategic Goods Trade Restrictions

During the Cold War when the Western export control organisation COCOM was engaging in economic warfare with the Soviet Union, strategic goods were seen as goods that were relatively inefficient to produce domestically, but were needed for the pursuit of a particular strategy. Since the end of the Cold War, controls over exports of a strategic but not necessarily military nature have been handled in a more limited fashion by regulating the export of dual-use goods. These legal boundaries also potentially apply to security technologies, and DG-Enterprise and industry warns security research programme applicants that they need to consider whether their application falls into these categories. The most recent EU legislation on this is Council regulation 428/2009, which defines ‘dual-use items’ as “items, including software and technology, which can be used for both civil and military purposes, and shall include all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices”.<sup>30</sup> The list of items covered by this regulation is likely to cover some non-military security equipment and technology, particularly technologies in the area of telecommunications, information security and unmanned aerial vehicles. The export of some types of non-military security equipment is also controlled under Council Regulation (EC) No. 1236/2005 or the ‘Torture’ Regulation (the Commission is currently working on proposals to tighten this regulation). Individual member states may also have stricter national regulations on the export of certain products, but so long as security technology exports comply with these regulations then the trade is legal.

Should these controls be further extended? A case might be made for this, given the difficulty in establishing whether or not the export will have a military end-use and thus be used in a way the exporting country does not find acceptable, and that there is a further risk that exports of

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28 Stankiewicz R et al (2009) p. 21.

29 James, A (2009b) Introduction and Synthesis Paper, [www.sandera.net](http://www.sandera.net) consulted 7 March 2011.

30 Council of the European Union, Regulation 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, Brussels, 5 May 2009: Article 2 (1).

security products could be used by recipients to perpetuate human rights abuses and other forms of internal repression. The UK's working group on arms 2009 report to the Quadripartite Committee on arms exports, for example, reports on the use of armoured Land Rover-based vehicles by IDF forces in Operation Cast Lead. The UKWG suggests that these were initially supplied as non-military utility vehicles but subsequently adapted into armoured vehicles by Israeli based company M.D.T. Protective Industries Ltd, part of the US company Arotech.<sup>31</sup> In another example, Amnesty International and Omega point out that between 2006 and 2008 both the Czech Republic and Germany have supplied security-related equipment that could be used for torture to countries that are known to commit human rights abuses.<sup>32</sup> Similarly, there was considerable criticism of EU exports to North African and Arab states in Spring 2011, when such exports were potentially used in an attempt by regimes to crush popular uprisings. Critics of the EU's security research programme have also questioned the levels of funding that Israeli firms and researchers are receiving from the programme, and in particular the funding of firms like Elbit Systems, which was involved in the construction of the controversial separation wall.<sup>33</sup> Given these loopholes and the potential for problematic usage of EU security exports, should restrictions be tighter, especially given that DG-Enterprise and Industry's vision for the strengthening of the security technological and industrial base clearly implies a vigorous export strategy?

On the other hand, more extensive or restrictive controls potentially ignore the issue of global interdependence. If international passenger flights are to be made secure, is the more sensible option to ban flights from any country deemed a terrorism concern, or to ensure that the country can acquire advanced screening technology? Does the exclusion of problem states from the group of states allowed to be 'secured by technology' simply increase feelings of inequality and unfairness in global politics, which in turn can fuel terrorism? Moreover, expanding the definition of dual-use goods to include all potentially problematic cases can lead to humanitarian crises, as US abuse of the concept during the UN sanctions on Iraq between 1990 and 2003 showed.<sup>34</sup> It seems that the option of simply imposing greater restrictions on these items is not entirely straightforward.

### Is the merging of security and defence markets real, problematic, or useful?

Although real gaps still exist between military and civilian users of security and defence products in their practices, requirements and legal constraints, there has undoubtedly been a blurring of the boundaries. In part, this is because of technological dynamics: the opening up of a previously closed system of defence innovation because of the need to draw upon more advanced civilian technology, which has lessened the "silo mentality" conviction that defence is different. In part too, it reflects a belief on the part of policy-makers that technology can offer answers to the 'new security' problems that have emerged, and a willingness particularly at the EU level to open up a funding stream. Defence manufacturers have been well-placed to expand into this new funding pool - which has high entry barriers for firms not accustomed to high research and development outlays and to the extensive government relations needed when the user group is so small - and

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31 UK Working Group on Arms, Memorandum to the Committees on Arms Export Controls, 8 December 2009: [http://www.publications.parliament.uk/pa/cm200910/cmselect/cmquad/memo/arms\\_exp/caec%2008.htm](http://www.publications.parliament.uk/pa/cm200910/cmselect/cmquad/memo/arms_exp/caec%2008.htm) consulted 7 March 2011.

32 Amnesty International and Omega Research Foundation (2010), *From Words to Deeds: making the EU ban on the trade in 'tools of torture' a reality*, London, Amnesty International.

33 Hayes, B, Should the EU subsidise Israeli security?, *European Voice*, 18 March 2010.

34 Gordon, J (2010) *Invisible War: The United States and the Iraq Sanctions*, Harvard, Harvard University Press.

have been strongly encouraged to do so by policy-makers. It is important not to overstate the case: the security and defence markets have not merged, but the boundaries are more blurred than once was the case.

Is this useful or problematic? Clearly it raises some problems around export regulations as outlined above, but the really problematic issue is in fact an internal issue, namely the future of internal security within the EU. Several worrying trends seem to be emerging. It is not simply a question of militarisation. The involvement of defence firms so long as they understand the very different policy terrain is not necessarily problematic. As Bailes points out,

“The real issue is not so much about ‘militarization’ of the Union as about an increasingly salient *securitization* of its entire identity and image, which the EU as a conscious organism is not yet equipped to recognize, let alone to handle maturely.”<sup>35</sup>

More and more issues are being portrayed as security problems to which security technologies can offer solutions, but the mere definition of issues as security problems legitimises reactions that would otherwise be viewed as problematic. The rights of both EU citizens and non-citizens seem to play second fiddle to the overarching goal of security. But there needs to be a better balance struck. The second problem is that the rapid advances in technology are running ahead of legislation on their legitimate use. Current discussions on deploying unmanned aerial vehicles for civilian surveillance would be a good example of this. Is it appropriate? What limitations should there be? The EU security research programme has been criticised for a lack of attention to transparency and concerns about citizens’ rights. It is to be hoped that these are teething pains rather than a harbinger of what is to come in any extension of the programme in future.

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35 Bailes, A (2008), ‘The EU and a ‘Better World’: What Role for the European Security and Defence Policy?’ *International Affairs*, 84:1:pp. 115-30: here p. 118.



# Will the European Defence Market strengthen or weaken the EU's Foreign and Security Policy?

Dr. Herbert Wulf, University of Duisburg

*"The establishment of a jointly organized European armaments industry ... is an essential element in developing a common industrial policy."*

*Resolution of the European Parliament in June 1978, based on the Klepsch Report (Document 83/78)*

## Introduction and Background

Will the European defence market strengthen or weaken the EU's Foreign and Security Policy? The answer is very simple: We don't know! Of course, this is not a satisfactory answer. The reason for this plain but inadequate answer lies in the fact that we have neither a fully developed European defence market - on the contrary, this so-called 'market' is far from being a market and is not at all 'European', instead being largely dominated by national and regional interest as well as a few national industry champions - nor is there a fully developed Common Foreign and Security Policy (CFSP). CFSP is all too often not very 'common', as the open controversies and disagreements about the participation in the Iraq War have illustrated, and as the taboo issue of British and French nuclear weapons within the EU foreign and security policy proves.

In addition to the question of whether a defence market would possibly strengthen or weaken EU CFSP, there is a third possibility, not foreseen in the question, that the defence market has no impact at all.

Instead of giving a clear-cut answer to the question, I will try in this chapter to speculate about the possible and the most likely impact on CFSP of establishing a European defence market. I will do this in three steps: I will *first* briefly mention what the ethical base and the normative power of the EU foreign and security policy is. I will *secondly* describe the situation of the defence industry and why the EU is far from establishing a defence market. And *thirdly*, I will develop a few scenarios of possible future outcomes of the EU defence market and its relation to CFSP.

## The basis of the EU's security and peace policy

The philosophical base and moral and normative power of the EU rests on three pillars:

1. The EU sees itself as a *security community and a peace project*. The concept of 'security community' (Deutsch/Burrell/Kann, 1957) is, in its ideal form, exactly what EU CFSP aims at. It means that countries try to organize and regulate their relations - even if they are controversial - by peaceful means and not by wars, coercion and violence. Groups of countries or societies try to come to (formal) agreements that guarantee their security. The result will be an emerging partnership. From its earliest documents (the Schuman Declaration of 1950) until the EU Security Strategy of 2003 and the Lisbon Treaty of 2007, the European Community

and Union has emphasised the importance of peaceful settlements of conflicts and the non-aggressive character of the organization.

2. The EU wants to pursue the concepts of *human security* and *the responsibility to protect*. (UNDP 1994, ICISS 2001) The EU has not formally adopted these concepts, but stated in its Security Strategy “A Secure Europe in a Better World”: “The European Union is inevitably a global player ... it should be ready to share in the responsibility for global security and building a better world.” (European Union 2003) The concept of the ‘responsibility to protect’, widely discussed in the UN, is one of the corner stones for the EU’s engagement in Africa and other parts of the world, with both military and non-military means in peace operations.
3. The EU’s security policy is strongly impacted by its *fight against terrorism*. The 2003 EU security strategy - the first of its kind for the EU - illustrates this by the fact that, when looking at the threats and challenges to Europe, it perceives terrorism as a key threat. This strategy is sometimes in conflict with its normative ambitions as it prioritises de facto military strength over civic crisis prevention.

These three political-strategic pillars have an influence on the direction and shape of EU security and peace policy. That does not mean that the EU always practises what is preached. Nor does it follow that the three notions are decisive for the development of a European defence market. Other forces and interests are much more critical for the present structure of the defence industry.

### The EU as a global power and the defence market

During the last decade, the EU has undoubtedly emerged as a global power. Occasionally there is debate about its (lack of) capabilities, especially military capabilities. Nonetheless, the foreign and security policy of the EU is clearly oriented towards playing an important global role in conflict and peace issues. How does the defence market – a European defence market – fit into this picture? In theory, and in an ideal world, the defence market should not play a role at all. Only foreign, security and peace policies alone, possibly with development co-operation, should be decisive when a decision is taken to engage in crisis prevention, conflict mediation, peace building and so on. The only task attributed to the defence industry in this scenario should be to provide the best and most efficient tools to the EU (and its forces), at an acceptable price, to enable the EU to carry out its mission effectively. However, that is theory. Practical experiences of the last five decades illustrate how different the role of the defence industry is and what influence the related economic imperatives have.<sup>1</sup>

Let us assume, not an unrealistic assumption, that *politics* in the EU and among most of its member countries continue to favour a gradual trend towards further Europeanization of CFSP and European Security and Defence Policy (ESDP). It is not likely that there will be dramatic changes, either towards an enhanced, speedy Europeanization or the reverse. If that is the case at the policy level, what other points of reference exist and how will other stakeholders influence this process? The following 12 points describe the present situation of the defence industry:

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<sup>1</sup> This section is largely based on the author’s contribution to a project of the European Federal Metalworkers’ Federation (2010) on the shipbuilding industry in the EU.



## Economics and government policy

*Policy:* The security environment in Europe has changed. Large-scale aggression against any member state is now improbable. Governments have adjusted their strategies and policies accordingly. However, the changes regarding procurement and development of weapon systems and armaments are extremely slow. Today, some weapon systems are still produced that were designed during the Cold War period (for example, fighter aircraft).

*Weapon Requirements:* The new threat scenarios in international policy (UN peacekeeping, anti-terrorism, anti-piracy) result in the evolution of strategic concepts of the different armed forces and the development of new types of weapons (force projection, on-the-ground operations, remote control, support/protection of friendly fleets, etc).

*Economic Protection:* European governments play a decisive role for future developments. The state is the main buyer and in many cases facilitator for exports of weapon systems. The various governments are protecting and supporting their national industries. Despite the rhetoric of the need for competition and a common defence market, defence production in Europe is an example of governments practising policies to favour domestic companies. Within the defence sector there is a strong trend for preferential contractual arrangements with domestic companies. Political directives to enforce competition between defence companies would change the structure of the industry and its economics.

*Budgets:* The general financial crisis and the resulting dramatic increase in public debt has put and will continue to put pressure on budgets. Procurement programmes are not spared from budget cuts, on the contrary. It cannot be ruled out that scarce public resources, the high indebtedness of states and the credit crunch will cause a reversal of fundamental security policies, including cancellation or deferral of already agreed procurement programmes. The increasing cost of weapons systems will reduce the number of platforms produced and also the workforce employed in the industry. The units in service in the armies, navies and air forces in EU countries will continuously shrink. The present scale of industrial capacity for the development and production of weapons and other military equipment in the EU is larger than can be maintained under current budgets. Present procurement programmes in most defence sectors are too small to keep the presently available industrial capacities fully occupied.

## Exports

*Markets:* Export markets continue to be of great interest for the industry. However, there is not enough workload in exports to compensate for the reduction in domestic demand. In addition, exports are a highly competitive and risky market. Export success will be decisive for the future of several of the major defence producers in Europe. Some companies will be able to avoid a downturn in sales thanks to state support in export projects. The financial risks in export markets and the requirements for package deals will grow over the next years.

*Regulation:* Restrictive export regulations, although in force in the EU, are not applied rigorously. Therefore, in practical terms, export regulations are not limiting companies' export strategies.

## Companies

*Strategies:* The major companies follow different types of business strategies to cope with the present situation. Elements of these strategies are

- concentrating on defence,
- searching for European and international cooperation partners,
- divestment and concentration on very specific sectors only and diversification into non-military market,
- specialization on certain products, privatization and
- internationalization in sales and investments.

Industry representatives do not expect a fast re-organisation of the defence sector at the European level – certainly not in the short to medium term. They practice business models along the lines of present policies, namely national orientation and sustaining minimum capacities with modestly reduced employment levels and fierce competition in the export market.

### **Employment**

*Employment levels:* The level of employment in European defence industry amounted to approximately 750,000 direct jobs in 2006 (BIPE 2008). This is low compared to previous periods; but even this level will be difficult to maintain in Europe. The industry's strategy to react to the decrease in demand consists of downsizing and holding on to smaller key capacities at financially affordable levels. In the medium term it must be expected that there will be a constant and slow decrease in employment due to financial constraints and productivity gains. However, at the same time these trends would also result in further rationalization and reduction of the workforce.

### **European cooperation**

*Industry approaches:* European perspectives for joint projects are not widely perceived as an alternative by the industry and, thus, not actively pursued by them. As a general rule, companies get involved in EU cooperation programs only when such procurement cannot be financed at the national level. Most big companies seem to be open to limited cooperation within the EU in specific projects. The conditions for forming more European companies (on the EADS model) are not given. Besides, the way EADS has developed, with its numerous economic and governance difficulties, is not an example that private investors would want to pursue.

*Common programs:* An aggregation or cross-national consolidation of defence producers at the EU level would require common programmes. However, due to differences in sequencing of procurement, low production numbers, diverging mission requirements, and limited accessibility for European cooperation in some areas (i.e. the nuclear systems of France and Great Britain) such programmes are not in the making. Different ownership structures (public versus private) in countries like the UK, Germany, France, Italy and Spain complicate transnationalisation.

*EDA:* Currently, the European Defence Agency (EDA) has a limited agenda: for example, there is no substantial programme in the naval sector. The agency is limited to efforts to create transparency in the market and to support new research projects. Thus, the agency is likely to play only a minor role for the foreseeable future.

*Europeanization:* A larger European 'solution' for a European military industrial base would mean more value for money. This includes the chance that coordinated programmes would bring down cost due to economies of scale and would save taxpayers' money. The political and military rationale favours intensified cooperation and a truly European defence market. However, national

interests (national champions and other business interests, the interests of defence-dependent regions, access to high-tech developments, jobs) prevent cooperation on a large scale. even so, financial bottlenecks and public debt will push towards more efficient defence production.

### Perspectives: Options, Scenarios and likely Outcomes

What are the most likely developments and outcomes for EU policies and the defence industry over the next five to ten years, considering the norms and foundations of policies as well as the present status of defence production, its strong national orientation, and the constraints on procurement budgets?

In this debate, several options are frequently discussed which involve always the same key players: primarily political decision makers at the national level, and industry. Foreign policy and EU politics play only a marginal role. Six possible scenarios can be distilled from these debates. Each of the scenarios may include several additional options that are partly inter-connected. All of these scenarios are strongly influenced by a scarcity of financial resources.

#### Scenario 1: Continued national orientation

The existing policies in most EU countries - of simultaneously emphasizing the need for European cooperation and favouring their national industries - will continue. The present structure of industry will remain in its basic configuration. Governments will continue to opt for maintaining core competencies on the national level. Governments of the larger EU countries are set to maintain a sustainable defence industrial structure in the medium and long-term.

As long as governments are intent on following a nationally orientated industrial policy, foreign companies are restricted in entering the domestic market. Thus, there is no need to compete against possibly more efficient producers from abroad. Competition at the national level is limited, since the skills and technology required to maintain the full range of high-end weapons and weapon platform design and construction capacity does not allow for more than one tier-1 contractor in each of the different areas of defence.

Further consolidation, on the basis of guaranteed minimum capacities, is required. As a result it can be expected that further consolidation of industrial capacities will strengthen the already existing trend to create "national champions". This process of restructuring could possibly be accompanied by closer cooperation between these national champions on the few existing European projects, and also in exports.

Since national budgets secure certain minimum capacities, job losses will occur, but within limits. Will the European defence market strengthen or weaken the EU's foreign and security policy in this scenario? By definition, in this scenario there is no EU defence market. The effect of this non-existent market is, of course, that national considerations might overrule common or EU policies. The growing export dependence of defence companies might, in addition, limit or even counter-act EU policies and their orientation towards common norms in human security, responsibility to protect, human rights etc.

## Scenario 2: Europeanization

Considering the declarations made about Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP), and the political rhetoric about joint European projects in defence procurement, the Europeanization of the defence industry seems like a plausible option. Furthermore, given limited budgets on the one hand and the demand for modernization of the armed forces on the other, theoretically there is a strong in-built trend towards further Europeanization - as has already partly been experienced in some defence industry sectors like aircraft, missiles, helicopters, or electronics. The rationale of such a process is its political relevance (political aim to cooperate), its economic reasoning (more value for money) and the pressure of scarce resources (intensified financial crunch).

However, various national interests (technology development, maintaining employment, regional considerations) have prevented this process from becoming reality. In addition, as mentioned above, the sequencing of procurement orders, the partly conflicting mission requirements of weapon platforms, and the incompatible ownership structure of companies create high barriers to a potential Europeanization project.

Nevertheless, potential changes could facilitate a process of Europeanization. This may happen both on the basis of political decision-making (CSDP) and of industrial considerations (cross-border cooperation or mergers and acquisitions). The national champions might start to collaborate in emerging pan-European procurement projects as well as on export markets. A further Europeanization of limited scope seems feasible only if a larger European procurement programme could be realized.

At present Europeanization is not a realistic scenario and CSDP plays no priority role for industry – although, of course, EU security policy (of intervening outside Europe) has had important effects on the type of demand for defence production, especially in logistics: different types of ships, long-range transportation facilities etc.

A truly (but presently unlikely) European defence industrial project would mean more value for money. That could result in a decreased total procurement budget. Given the budget constraints, Europeanization would most likely strengthen the industrial restructuring and consolidation process, including the closure of production sites and the loss of employment in large numbers. Europeanization of defence production would necessarily strengthen the common EU interest at the expense of national interests. Whether the EU's CFSP would be more "militarized" or "civilianized" as a result is an open question.

## Scenario 3: Bilateral or multilateral cooperation

Cooperation at a bilateral or multinational level does not only offer (economic) benefits; costs are also involved. Experience in cooperation projects illustrate that such cooperation usually increases costs and extends time schedules. Therefore, less ambitious cooperation (at the level of companies from only two countries) could be a medium-term compromise on the way to a long-term Europeanization. Direct cooperation, cross-ownership between companies from different countries, and other forms of bilateral cooperation are feasible.

A driving force for such projects comes from economies of scale in the domestic market and the logic of cooperative joint efforts rather than ruinous competition in exports.

Given the experience of the past, cooperating partners in joint projects usually insist on a division of labour guaranteeing that both technological know how and employment is split according to the financial stakes involved. Thus, this type of cooperation would have only small or marginal effects on CFSP.

#### **Scenario 4: Internationalization and investment outside Europe**

Defence producers from several European countries have successfully exported their weapon systems and have also produced such products under licence in other countries. Scenario 4 assumes company strategies that aim at expanding their market (and production facilities) by investing in potential importing countries. This strategy has been most clearly pursued by BAE Systems. Candidates as importing countries with a potential for production are, among others, Brazil, China, India, Israel, South Africa, South Korea and Turkey.

Such a business concept could also lead to the formation of strategic alliances and a drive to realign relationships among the companies. Such alliances are also possible with transatlantic partners. This strategy could result in the transformation of major companies with a continuously growing share of production outside Europe.

A result of such a strategy would certainly be some loss of national political control over defence production. Company strategies would be further decoupled from a European foreign and security policy.

#### **Scenario 5: Divestment, Diversification and Conversion 2.0**

The financial crisis and the defence procurement budget cuts could lead to divestment (focus on core competencies) and/or diversification strategies. Some companies already pursue a strategy of spinning off part of their facilities.

Focus on core business or divestment strategies can entail different concepts. It can be directed at moving out of the defence sector entirely. It could alternatively mean exclusive orientation on defence production with no interest in non-military production.

Other companies are starting to explore again the possibilities of conversion. Following the reluctant conversion strategy of some small and medium size companies after the Cold War, it is one possible option that might gain momentum as defence contracts are shrinking.

In this scenario there is an in-built drive towards more cooperation in the EU as described in scenarios 2 and 3.

#### **Scenario 6: Leasing, Outsourcing and Public-Private-Partnerships**

Considering the scarcity of resources in EU countries and the growing experience in Public-Private-Partnerships (PPP) in the defence sector, as well as a general trend to outsourcing traditional military functions, it can be expected that private financing and services might play a more important role in future. While these partnerships do not solve the problem of funding in the long-term, they are a means to overcome short-term financial bottlenecks. This could also entail moving away from single production orders to full service contracting.

This PPP model might be more attractive to some governments than to others; it is, however, not to be expected that such a model would be implemented across the board in all defence sectors and countries. It will probably be limited to the outsourcing of non-core competencies. Thus, the impact on EU CFSP would be minimal or non-existent.

## Conclusion

In conclusion, the questions raised in the introduction: “Will the European Defence Market strengthen or weaken the EU’s Foreign and Security Policy?” is almost a hypothetical one. CFSP seriously lacks a common EU foundation, the defence market does not exist and industry interests are jealously guarded at the national level. A Europeanization of defence production does have the potential to contribute positively to a “whole-of-EU” foreign and security policy. Two contradicting tendencies however make a prognosis on future structures difficult:

First, the enormous and probably long-term financial difficulties of many EU member states put pressure on political decision-makers to opt for the economic gains a EU defence market has to offer. The dire financial situation might open the door for the reversal of the cited, often short-term, national interests.

Secondly, given the economic interests of stakeholders in the defence industry (including their export orientation), it is hard to see how this could contribute to a European foreign, security and peace policy that is based on norms that put people and peace in the centre (human security and the notion of security community). On the contrary, it must be expected that a European defence market would not be oriented upon clear political priorities and guidelines and not under the control of the peoples of Europe.

Export orientation, privatization, outsourcing, internationalization etc. are likely to reduce the necessary political control over an industry that does not supply normal consumer goods but is charged with delivering the tools for the state to maintain its monopoly of force. This requires transparency and good governance. Whether the political will and the structures for such a process are in place in the EU – I have serious doubts.

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# Openness in the European defence market and company competitiveness

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*The aim of the present informal paper is to give a reasonable picture, as a basis for later discussions, of some of the most relevant elements featuring in the European Defence Equipment Market and the intergovernmental approach taken by the European Defence Agency.*

## Main features of the European defence market

First of all, it should be stressed that the European defence industry is currently facing a new situation determined by three factors:

A. The trend and will to re-allocate defence public expenditures as a consequence of the current financial and budgetary crisis;

B. The lack of certainty regarding the concrete shape and tasks that European defence will be endowed with in the future, something that is determined by political factors. No answers are available on this in the short and medium term.

As a consequence of **A+B**, the European defence industry will most likely have to find additional markets outside Europe, where it cannot count on the same advantages it enjoys in the domestic market to maintain its current size; thus it will desperately need to be more competitive.

C. The serious competitive pressure that the European Defence industry is facing already and will face in the future - perhaps even at home! This arises from traditional competitors who may be more flexible than the EU in adapting to new circumstances – the USA may be such a case; and from emerging countries that are able to compete on price, a paramount factor in critical times (India, China, Brazil...). As a consequence of **A+B+C**, If the European Defence Industry is not able to adapt to and to compete in the new world scenario – by means of specialization, re-structuring, cost reduction, or exploitation of an overwhelming technological edge - it will face very serious difficulties.

From the point of view of the regulatory and institutional perspective, the EU's defence sector has long been fragmented into, and by, protected national markets. National regulations generally grant room for national contracting authorities to protect, in one way or the other, their national industry. National concerns are even clearly expressed in European primary law: Article 346 of the Treaty on the Functioning of the European Union (TFEU), former article 296 of the Treaty of the European Community,<sup>1</sup> provides a margin of manoeuvre for Member States to

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<sup>1</sup> Article 346: 1. The provisions of the Treaties shall not preclude the application of the following rules: (a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security; (b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes. / 2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.

exclude defence procurement from the regular rules of the internal market. The interpretation of article 346 by the EU Court of Justice makes clear, however, that this privilege is not unlimited.

Both the European Commission (EC) and the EDA, who are partners and complementary actors, have taken up the challenge of addressing this situation. From the regulatory point of view, a series of instruments of a normative/interpretative nature have been issued:

- the Directive on Security and Defence procurement 2009/81, of 13 July 2009,<sup>2</sup>
- the Directive on Intra Community Transfers, of 6 May 2009,<sup>3</sup> and
- the Interpretative Communication on art 296 TEC, of 7 December 2006.<sup>4</sup>

Nevertheless, it must be admitted that the set of specific exclusions granted in article 13 of Directive 2009/81 - which include, without going into too much detail, contracts awarded by international organisations or under their rules, contracts for intelligence activities, cooperative procurement, government to government procurement, and R&D services - limits its expected impact, since the percentage of defence expenditure that the Directive applies to in practice is probably far from being even the majority of the “defence cake”.

Opening the Defence Equipment Market to full competition implies clear risks as well. Some of the new Member States that opened up and/or privatised this sector after their political transition realise now that the consequence has been a severe loss of capabilities, and a radical decrease in their industrial strength and competitiveness.

### The role of the European Defence Agency (EDA)

As already noted, the European Union’s defence sector has long been fragmented into protected national markets since, under Article 346 of TFEU, defence procurement can be excluded from the normal competitive procurement rules of the single market. The European Defence Agency (EDA) has designed and is implementing a series of measures of a more flexible, not legislative but intergovernmental, nature that aim at creating an appropriate environment among the stakeholders (governments and industry)..The EDA plays the role of a facilitator and a promoter.

### The specific role of the EDA’s Industry and Market Directorate

The EDA Industry and Market Directorate is focused on creating an internationally competitive European Defence Equipment Market mainly through an intergovernmental Regime in Defence Procurement; and supporting the restructuring and strengthening of the European Defence Technological and Industrial Base through implementation of the European DTIB strategy agreed by Defence Ministers. In this effort, EDA is working closely with participating Member States (pMS), the European Commission and the defence industry. Through its dialogue with these stakeholders, the Directorate aims to strike the right balance between industrial development and competitive market issues.

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2 Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain contracts, supply contracts and service contracts by contracting authorities or entities in the field of defence and security and amending directives 2004/17/EC and 2004/18/EC, OJ L 216/76, 20 8.2009.

3 Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community, OJ L 146/1, 10.6.2009.

4 Commission of the European Communities, *Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement*, COM (2006) 779 final, Brussels 7.12.2006.



The Intergovernmental Regime on Defence Procurement took effect from 1 July 2006. The Regime is made up of:

- the Code of Conduct on Defence Procurement, for government contracts of 21 November 2005.<sup>5</sup> It covers defence equipment purchases where the provisions of Article 346 of the TFEU are applicable.
- the Code of Best Practice in the Supply Chain for industry to industry opportunities (both prime contractors and sub-contractors for sub-systems and components).<sup>6</sup> It was approved by Defence Ministers on 15 May 2005.

This regime aims to improve transparency and promote cross-border competition on a level playing field within the EDEM, both for prime contractors and for sub-contractors for sub-systems and components. A crucial aspect of this new transparency is the posting of contract opportunities on an online portal operated by the EDA. Since 1 July 2006, this portal has been advertising contract opportunities for procurement by governments and armed forces in those Member States subscribing to the regime on defence procurement. There are currently 26 participating member states: 25 out of 26 EDA Member States (Romania being the exception)<sup>7</sup> and Norway. From 29 March 2007, opportunities for sub-contractors as suppliers to prime contractors were added to the portal. The EDA is also addressing issues that are linked to transparency and the effectiveness of competition, such as Security of Supply; Public Support; Offsets; intra-community transfer issues, and others (on which see more detailed sections below).

A number of questions frequently asked about the Intergovernmental Regime on Defence Procurement may be addressed here. First, if it is asked whether additional instruments for the regime are being planned, the answer must be that the whole regime is a living element. Specific matters like the push for a level playing field (referred to later in this paper) will perhaps give rise to new measures. Secondly, it may be asked whether measures adopted intergovernmentally in the EDA framework, such as the Code of Conduct, will become binding. The fact is that the norms-based approach familiar in the Community setting, where binding regulations are accompanied by control mechanisms - although a very useful tool - is not the only possible one. The history of the EU reflects how frequently the will and engagement of the concerned actors, both governmental and private, has proven to be a really efficient mechanism. Finally, some may ask whether the type of regime constructed through the EDA will become redundant once the defence market Directive 2009/81 has been implemented. In reality, whatever may be the impact in the market of the Directive, Member States can be expected still to consider that their essential security interests of security require recourse to the exception in article 346 TFEU.

### The Intergovernmental Regime on Defence Procurement (IRDP): Key features

The most important general features of the IRDP are:

- **Its voluntary, non-binding approach.** No legal commitment is involved or implied. Member States voluntarily align their policies on a reciprocal basis. They are free to cancel their participation in the Regime at any time and no sanction is envisaged for non-observance of the

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5 European defence Agency, *The Code of Conduct on defence procurement of the EU member states participating in the European Defence Agency*, adopted by the Steering Board on 21 November 2005, consulted via [http://www.eda.europa.eu/Libraries/Documents/CoC\\_1.sflb.ashx](http://www.eda.europa.eu/Libraries/Documents/CoC_1.sflb.ashx).

6 European Defence Agency, *The Code of best practice in the supply chain*, consulted via [http://www.eda.europa.eu/Libraries/Documents/CoBPSC\\_final.sflb.ashx](http://www.eda.europa.eu/Libraries/Documents/CoBPSC_final.sflb.ashx).

7 Denmark does not take part, by its own decision, in the EDA.

Code by any Member State, beyond the requirement to offer an account to the other participants.

- **The idea of fair and equal treatment of suppliers:** all relevant defence procurement opportunities offered by Member States are notified on one single portal. Notifications briefly describe requirements, procedures and timescales for the competition and the award criteria. Announcements are also posted on the award of contracts. Further, during each contract competition, fair and equal treatment will be assured in terms of :
  - *selection criteria:* evaluation on the basis of transparent and objective standards (possession of security clearance, required know-how, previous experience...)
  - *specifications and requirements*, which are to be formulated as far as possible in terms of *function* and *performance*; international standards will, wherever possible, be included in the technical specifications.
  - *award criteria*, which are to be made clear from the outset; the fundamental criterion will be the most economically advantageous solution for the particular requirement, taking into account inter alia considerations of costs, compliance, quality and security of supply and offsets;
  - *debriefing*: unsuccessful bidders who so request will be given feed-back after the contract is awarded.
- **Mutual transparency and accountability:** subscribing Member States can regularly scrutinize comprehensive data provided to show how the regime is impacting on defence procurement in practice. When exceptions are invoked or other irregular events occur, these Member States will receive explanations and the opportunity, if need be, to debate the circumstances at the EDA Steering Board. While the EDA itself is not an investigator, it provides an instrument to achieve such mutual transparency and accountability through the EDA monitoring and reporting system which entails regular reports to the Steering Board. The Agency needs, of course, appropriate cooperation from national staffs.
- **Mutual support:** the opportunity to sell into each other's defence markets implies a reciprocal obligation to do everything possible to ensure supply; this involves governments as well as industries. Fully effective operation of the Regime depends on mutual confidence and interdependence. Subscribing Member States' governments undertake to do everything possible, within the limits of national legislation and international obligations, to assist and expedite each others' contracted defence requirements - particularly in urgent operational circumstances - and to work to increase the level of mutual confidence notably by improving the predictability and dependability of their regulations and policies. These Member States are also committed to support efforts to simplify intra-community transfers and transits of defence goods and technologies.
- **Mutual benefit:** all subscribing Member States need to see some benefit from subscribing to the regime. An important aspect is the opportunities provided for small-and medium-sized companies to sell into a continental-scale market. Customers for such companies may be prime contractors rather than end-users. The Electronic Bulletin Board (EBB) - Government Contracts, or EBB 1, launched on 1 July 2006, is the technical tool of the Code of Conduct in this connection and is handled by the EDA's I&M Directorate. Through the EBB 1, suppliers gain the opportunity to bid for defence contracts advertised by contracting authorities from subscribing Member States.

The *Code of Best Practice in the Supply Chain (CoBPSC)* works alongside the CoC. It was approved by Defence Ministers on 15 May 2005: it extends the benefits of greater competition, transparency, fair and equal treatment of suppliers in a way that allows added value to flow down the sup-

ply chain, especially to lower-tier companies and SMEs who may not be able to bid for contracts directly but could act as sub-contractors. Its main features are:

- It is *voluntary*, forming an integral part of the Code of Conduct to be read and implemented in coherence with it (thus no legal commitment is involved).
- It promotes and encourages the principles of the Code of Conduct on Defence Procurement in the supply chain by *increasing competition, transparency and fair and equal treatment* for all suppliers (especially for SMEs) and by propagating good practice *down the supply chain*.
- It extends beyond the scope of Article 346 TFEU, leaving its application to the discretion of Industry according to their requirements, always subject to sound technical and financial considerations.
- It *does not deal directly with the performance* delivered by goods and services, nor does it aim at specifying contractual terms.

The implementing tool of the CoBPSC is the Electronic Bulletin Board (EBB) – Industry-to-Industry Contract Opportunities, or EBB 2, launched on 29 March 2007. It enables prime contractors and lower-tier buyers to promote and advertise contract/sub-contract opportunities to a wide industrial base, while at the same time it enhances the market research capabilities of suppliers (especially SMEs). The industry-to-industry part of the EBB portal is still experiencing low levels of activity for a number of reasons, including confidentiality and commercial sensitivity issues, as well as lack of new orders especially in a time of economic crisis. It is currently mainly being used by its Buying Community for market research purposes, to identify potential new suppliers.

### The EDA strategy on the European Defence Technological and Industrial Base (EDTIB)

A strong DTIB in Europe is fundamental for the European Security and Defence Policy. In concrete terms, the EDTIB has to

- supply the bulk of the equipment and systems the European Armed Forces require
- ensure the best that world-leading technology can provide
- guarantee that the EU can operate with appropriate independence
- provide a valuable economic asset (a major source of jobs, exports and technological advance, which in turn helps to maintain public support for defence),

An EDTIB capable of delivering these goals needs to be:

- Capability-driven (focussed on operational requirements of the Armed Forces of the future, whilst sustaining the necessary levels of European and national operational sovereignty)
- Competent (able to rapidly exploit the best technologies)
- Competitive (both within and outside Europe).

The role of governments in bringing about the EDTIB entails, amongst others,

- Clarifying priorities (capability needs, key technologies, key industrial capacities)
- Consolidating demand
- Increasing investments
- Ensuring Security of Supply
- Increasing competition and cooperation

Some EDA instruments and actions particularly geared to support the EDTIB will be listed next.

## Security of Supply (SoS)

The concept of a truly European DTIB will not be realised in practice unless Member States can be confident that increased mutual dependence for supply of defence goods is matched by increased mutual assurance of that supply. In other words, Member States have to be sure that there is sufficient security when they entrust delivery of supplies to an actor from another Member State. A certain level of Security of Supply-related experience exists already among some subscribing states such as those party to the Letter of Intent (LoI), NAMSA, and the Nordic Agreement for example. In the EDA framework, the Framework Agreement on Security of Supply in Circumstances of Operational Urgency was adopted on 20 September 2006.

## Security of Information (SoI)

An Agreement on Security of Information was adopted on 20th September 2006. Full effective operation of the Code of Conduct will imply the release of classified information to industry located in other participating Member States. This requires that subscribing Member States have full assurance that when opening competition to EU defence companies located in other subscribing MS, their nationally classified information will be protected during the different phases of the procurement procedure; and conversely, that when competing for other MS contracts, their defence companies will not be discriminated against on SoI grounds because of their nationality or because of the duration of the process to release classified information.

Accordingly, the EDA's SoI agreement provides that subscribing Member States (sMS) will use EU Council security regulations for their national procurement under the Code of Conduct requiring protection of classified information, when the use of bilateral security agreements is not possible or not considered as appropriate by the procuring sMS. Further, they will use "Common Minimum Standards on Industrial Security" for their national procurement under the Code of Conduct requiring protection of classified information and when the use of bilateral security agreements is not possible or not considered as appropriate by the procuring sMS: these standards are adapted from the industrial security section of EU Council security regulations. Third, sMS commit themselves (in accordance with their national laws) not to further disclose information forwarded to them by companies which have designated the information as confidential within the framework of the Code of Conduct.

## Offsets

The Code of Conduct on Offsets entered into force on 1 July 2009. It lays down a new way for dealing with the very complex issue of offsets. First of all, the Code introduces much needed transparency into offset agreements, which up until now has often been lacking. To this end, an offset portal has been launched on the EDA's website, where for the first time ever, countries that signed up to the Code will publish information on their national offset policies and practices, including national regulations and guidelines, offset requirements criteria and modalities. Second, the Code provides for the evolving use of offsets. Last but not least, the Code introduces a 100% cap on offsets: consequently, subscribing governments will neither request nor accept offsets exceeding the value of the relevant procurement contract. The Code comes together with an important implementation tool: the Reporting and Monitoring system, which will help ensure mutual transparency and accountability among subscribing States.

### Level Playing Field (LDF): equity amongst competitors

Fair competition requires not only a level playing field, but also the assurance that individual competitors are not improperly advantaged. This suggests that features such as government ownership of, or publicly-provided aids to, defence industries will call for particular transparency in order to maintain mutual confidence that no unfair competitive advantage (such as hidden subsidy) is involved. The EDA has been tasked by participating MS to move forward in analyzing these matters, grouped in a consistent manner under the common working title of a Level Playing Field.

By these and other means, in parallel and in synergy with the work of the European Commission, the EDA is working with governments and industry to reduce the fragmentation and other artificial features of the European defence market, and to develop a research and industrial base that is capable both of meeting Europe's own defence and security needs to the highest standards, and of holding its own in legitimate international competition.



## Section 2: Arms export control: European and national policies

The growth of a European defence market poses inherent challenges for the common European export control policy. The cost-effectiveness of a European defence market will depend considerably on the amount of defence and security equipment it can export to third countries outside the EU. More production of defence equipment and lower trade barriers within the EU – as foreseen by directive 2009/43/EC – will increase the importance of effective export controls at the outer borders of the EU.

In line with the EU's goals in the field of foreign and security policy, EU member states have developed policies aimed at preventing arms transfers that might fuel armed conflicts, facilitate human rights abuses or undermine economic development. While the EU has elaborated an export control policy both for dual-use items and military equipment, this section will mainly focus on the latter.

In recent years there has been a concerted attempt to harmonize European policies on exports of military equipment. Of particular importance is the EU Common Position on Arms Exports adopted in December 2008, which lays out standard criteria for assessing applications for arms export licences. The first chapter in this section, by Mark Bromley, examines to what extent this process has led to more harmonized and/or more restrictive arms export policies at national level. The author assesses to what extent the effect of the common export policy is visible in the legal framework, the process and the outcome of national arms export control policies. Which policy aspects have been aligned and where is there still room for more harmonization? A further challenge is that negotiating common standards for arms exports does not necessarily lead to a strengthening of export controls but may also lead to a policy of the lowest common denominator.

Any arms export control regime seeks a balance between prevention of illicit arms exports and facilitating economic production and trade. Lately, the EU has taken a number of economically oriented initiatives to strengthen its own European defence market. At the same time it has emphasized the need for responsibility in arms trade by adopting the Council's Common Position on arms exports, it has been quite active in outreach activities to non-EU countries in order to strengthen their export control regimes, and has been a fervent supporter of a worldwide arms trade treaty. Cédric Poitevin assesses in the second chapter of this section whether there is a balance or imbalance among these different aspects of EU policy on arms trade. Is the EU's economics-driven policy sufficiently balanced by a preventive policy? What possible avenues exist to strengthen efficiency and competitiveness in the EU's arms trade policy without jeopardizing its conflict prevention policy?

Last but not least, Quentin Michel addresses in the third chapter possible future roles for the EU. Currently, conventional arms exports are still under the sole sovereignty of EU member states. European harmonisation with regard to arms export control takes place under the Common Foreign and Security Policy. Contrary to export controls in the field of dual-use goods and technology, the European Commission has no role in regulating conventional exports and the European Court of Justice has no competences in this field. The author describes the differences and similarities between the European export policies applying to dual-use and military items,

posing the question whether the EU should have more competence to oversee exports of military goods to countries outside the EU and to take up a role as watchdog, or whether this is a bridge too far.



# The EU common position on arms exports and national export control policies<sup>1</sup>

Mark Bromley, SIPRI

## Introduction

EU member states have traditionally pursued divergent arms export policies, particularly in the granting and denying of arms export licences. However, since the early 1990s there has been a concerted effort on the part of EU member states to increase the level of coordination and harmonization in this field.

The drive to harmonize European arms export policies was largely motivated by three factors. First, the consolidation and internationalization of the European defence industry during the 1990s provided a strong economic rationale for better coordinated export policies. Second, a growing emphasis on conflict prevention after the end of the cold war led to calls for more ethical foreign policies, including on arms exports. Finally, revelations concerning the role of European states in the arming of Iraq in the run-up to the 1991 Gulf War provided a strong impetus for better controls on arms exports.

In the early 1990's the Council adopted eight criteria that member states agreed to apply when considering applications for arms export licences. During 1997 work on a more operational agreement began and the EU Code of Conduct on Arms Exports (EU Code of Conduct) was agreed in June 1998. The EU Code further elaborated the 8 criteria established in the early 1990s and established operative provisions, relating to information exchange and consultation, aimed at harmonizing their interpretation.

Under the EU Code of Conduct, member states committed themselves to set 'high common standards which should be regarded as the minimum for the management of, and restraint in, conventional arms transfers' and 'to reinforce cooperation and to promote convergence in the field of conventional arms exports' within the framework of the Common Foreign and Security Policy (CFSP).<sup>2</sup>

EU member states agreed to exchange confidential information on their denials of arms export licences along with aggregated data on their export licence approvals and their actual exports.

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- 1 This paper is based on a number of previous studies by the author, including: Holtom, P. and Bromley, M., 'The Limitations of European Union Reports on Arms Exports: The Case of Central Asia', SIPRI Insights on Peace and Security, Sep. 2010; Bromley M. and Brzoska, M., 'Towards a Common, Restrictive EU Arms Export Policy? The Impact of the EU Code of Conduct on Major Conventional Arms, Exports', European Foreign Affairs Review, Vol. 13, No. 3, Sep. 2008; Bromley, M., '10 years down the track - The EU Code of Conduct on Arms Exports', European Security Review No, 39, June 2008; Bromley, M., 'The Impact on Domestic Policy of the EU Code of Conduct on Arms Exports: The Czech Republic, the Netherlands and Spain', SIPRI Policy Paper No. 21, May 2008; and Bromley, M., 'The Europeanisation of Arms Exports Policy in the Czech Republic, Slovakia and Poland', European Security, Vol. 16, No. 2, Aug. 2007.
  - 2 Council of the European Union, 'European Union Code of Conduct on Arms Exports', Document 8675/2/98 Rev 2, Brussels, 5 June 1998.

Member states also agreed to consult other member states when considering the granting of an export licence which is 'essentially identical' to a licence that another member state had denied within the last three years. The data on licences and exports are compiled in a publicly available annual report according to operative provision 8 of the European Union Code of Conduct on Arms Exports (EU annual report). Originally intended to be a confidential exchange of information, the EU annual report has been publicly accessible since 1999 following pressure from the European parliament, NGOs, and the Finnish EU Presidency of July-December 1999.<sup>3</sup> Officials from EU member states also meet regularly in the Ad Hoc Working Group on Conventional Arms Exports (COARM) to exchange views on individual recipient countries and discuss the implementation of the criteria of the EU Code of Conduct.

In December 2008, EU member states replaced the EU Code of Conduct with the EU Common Position defining common rules governing control of exports of military technology and equipment (EU Common Position). Although the EU Common Position retained most of the main elements of the EU Code of Conduct - including the eight criteria - there were several key changes. First, the EU Common Position is a legal instrument, requiring member states to ensure that their national positions conform to common requirements. Second, it extended controls to cover the licensing of production abroad, brokering activities, transit and transshipment, and intangible transfers of technology.

The EU Code of Conduct and EU Common Position form part of a wider EU agenda designed to harmonize national arms export policies and promote more responsible licensing of arms exports. Other examples include the Joint Actions on Small Arms and Light Weapons of December 1998, and July 2002, and the Council common position on arms brokering of June 2003. Other elements are EU positions at international processes such as the UN Programme of Action on SALW, joint communiqués with other actors such as the USA and joint positions of EU member states in international forums, such as the G-8 meetings.

The EU is also promoting the adoption of a global Arms Trade Treaty (ATT) and has devoted significant amounts of money to building support for the agreement via regional seminars around the world. Last but not least, the EU has made arms transfer controls an element in its negotiations on accession to the Union with prospective member states, as well as with other states seeking association to the EU. All of these efforts are embedded in the wider framework of the EU's CFSP.

A number of studies have examined these developments and portrayed them as amounting to the 'Europeanization' of member states' arms export policies, understood as the process by which areas of domestic policymaking and implementation become increasingly subject to multi-level governance.<sup>4</sup> Hence, in the context of arms export policies, Europeanization manifests itself in

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3 Bauer, S. and Bromley, M., *The European Union Code of Conduct on Arms Exports: Improving the Annual Report*, Policy Paper No. 8 (Stockholm: SIPRI, 2004), p. 5. EU annual reports are available at <<http://www.consilium.europa.eu/show-Page.aspx?id=1484&lang=en>>.

4 See Hofhansel, C., 'The harmonization of EU export control policies', *Comparative Political Studies*, vol. 32, no. 2 (Apr. 1999); Schmitt, B., *A Common European Export Policy for Defence and Dual-Use Items?*, Occasional Papers no. 25 (Western European Union, Institute for Security Studies: Paris, May 2001); Bauer, S., 'The Europeanisation of arms export policies and its impact on democratic accountability', Doctoral thesis, Université libre de Bruxelles and Freie Universität Berlin, May 2003; and Bauer, S. and Remacle, E., 'Theory and practice of multi-level foreign policy: the European Union's policy in the field of arms export controls', eds B. Tonra and T. Christiansen, *Rethinking European Union Foreign Policy* (Manchester University Press: Manchester, 2004).

the emergence of a multilayered arms export policy, where certain decision-making processes have been taken out of the national context and moved into the intergovernmental or supranational level.

Despite the existence of the EU Common Position, and the apparent ‘Europeanization’ of this area of policy, all aspects of actual policy implementation in the field of arms exports remain firmly in the hands of member states. This raises the question of what impact the EU Code of Conduct and EU Common Position have had at the domestic level. Has the implementation of the EU Code of Conduct and EU Common Position led to more harmonized export policies, in line with the agreed minimum standards? How uniform has the impact been across the Union? How influential have the EU Code of Conduct and EU Common Position been relative to other multilateral instruments in the field of arms export controls, such as the Wassenaar Arrangement?

### Defining ‘arms export control policies’

The term ‘arms export control policies’ can be understood as referring to policies that govern ‘The dispatch of conventional weapons, weapon platforms and related equipment (that would normally be found on a military list of controlled goods) from one country to another’.<sup>5</sup> A state’s arms export policy can be thought of as having three elements; a framework, a process and outcomes.<sup>6</sup>

The framework of a state’s arms export control policy is the legal and regulatory framework governing arms exports. Among other factors, this includes: the list of goods subject to control; the criteria used for assessing whether a licence should be granted or refused; and blacklists of countries to which arms exports are automatically blocked.

The process of a state’s arms export control policy refers to the process by which the government determines whether or not to grant an export licence. Among other factors, this includes: the involvement of various government departments in the decision-making process and the relative importance of their opinions; the role played by international information exchange processes and consultation mechanisms in the national assessment process;<sup>7</sup> the level of parliamentary engagement in the licensing process; and the level of public and parliamentary transparency, that is, the amount of information that governments release about their arms exports, either to the parliament or the public at large.<sup>8</sup>

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5 Davis, I., SIPRI, *The Regulation of Arms and Dual-Use Exports: Germany, Sweden and the UK* (Oxford University Press: Oxford, 2002), p. xiv.

6 The conceptualization is based on that developed by Sibylle Bauer in Bauer, S., ‘The Europeanisation of arms export policies and its impact on democratic accountability’, Doctoral thesis, Université libre de Bruxelles and Freie Universität Berlin, May 2003.

7 This includes both the EU Common Position and other regimes such as the Wassenaar Arrangement and the Missile Technology Control Regime.

8 Since the early 1990s an increasing number of national, regional and international transparency mechanisms in the field of arms exports have been developed. E.g. under the UN Register of Conventional Arms (UNROCA), established in 1991, states are invited to submit to a public register information on their imports and exports of certain categories of major conventional weapons. Meanwhile, an increasing number of governments, particularly in Europe, have responded to parliamentary and public pressure and begun publishing national reports on their arms exports. Links to these reports are available at <[http://www.sipri.org/research/armaments/transfers/transparency/national\\_reports](http://www.sipri.org/research/armaments/transfers/transparency/national_reports)>. Public and parliamentary transparency measures do not in and of themselves constitute part of the process of a country’s arms exports policy. However, the oversight and accountability that they provide can have an impact on future decision making. For this reason, this issue has been included under the category of ‘process’.

The outcome of a state's arms export control policy refers to the types of arms the country exports and their destinations. Policy outcomes can be taken to consist of exports that result from a conscious decision on the part of the government. Illegal exports - where a company exports arms without a licence or where arms are diverted from the intended recipient - can be considered to be an issue of export control rather than export control *policy*.

While the EU Common Position plays an important role in guiding the formation and implementation of policy among EU member states in each of these areas, it is far from the only factor. Other areas that impact upon the arms export policies of a state include the defence-industrial policy of the exporting government; the pressure exerted by non-governmental organizations (NGOs) and parliamentarians; industrial and political cooperation with friendly states; the internationalization of the defence production process; the government's wider foreign and security policy priorities; and the products produced by its defence industry and the international markets it has traditionally served.

## Assessing the impact of the EU Common Position

### The framework of EU member states' arms export policies

The EU Common Position does not lay down a model for how member states should alter their national legislation in order to fulfill the obligations it entails. EU member states are legally obliged to implement the EU Common Position at the national level. However, states are under no obligation to transform their national legislation in order to do this. A member state's only obligations are to apply the criteria of the EU Common Position when making decisions on issuing export licences and to implement the operative provisions relating to consultation and information exchange. How states do this, including whether or not they include a reference to the EU Common Position's criteria in their national legislation and what form that reference takes, is left to the member states to decide.

Nonetheless, elements of the EU Code of Conduct and the EU Common Position have spilled over into national law. In particular, several states include a direct reference to the criteria of the EU Common Position in their national legislation. Under the EU Common Position states are also legally obliged to ensure that their national legislation enables them to control the export of the goods on the EU Common Military List. As a result, the national control lists of all EU member states match the coverage, although not always the categorization, of the EU Common Military List. At first glance, this appears to be an area in which the EU Code of Conduct and the EU Common Position have had a strong impact on the arms export policies of EU member states. However, the EU Common Military List is drawn directly from the Wassenaar Arrangement's Munitions List, with changes in the Wassenaar list leading more or less automatically to changes in the EU list.

The EU Common Position does not include a blacklist of countries to which arms exports are excluded. However, EU member states are politically bound to adhere to all EU arms embargoes imposed via Council Decisions. EU member states share a common view that mandatory United Nations arms embargoes should be respected. As a rule, for each UN arms embargo, the EU imposes a corresponding EU arms embargo. The EU has also imposed arms embargoes that go beyond the requirements of a particular UN arms embargo, as in the case of the arms embargo

on Sudan. In addition, the EU has imposed arms embargoes on targets that are not subject to UN arms embargoes, including China, Guinea, Myanmar, Uzbekistan and Zimbabwe.<sup>9</sup>

### The process of EU member state's arms export policies

The EU Common Position makes no reference to which government departments should be engaged in export licence decision making, the relative distribution of powers between those departments or the level of parliamentary engagement and oversight. There is no evidence of any impact by the EU Common Position on the division of responsibilities between government ministries. However, there is indirect evidence that the EU Code of Conduct and the EU Common Position have had an impact on levels of parliamentary accountability, even though this is not an area with which they address directly.

For example, in both the Czech Republic and Spain there has been an increase in the level of parliamentary oversight of arms export policy since 1998. There is clear evidence that Spanish NGOs and parliamentary groups have used the examples of other EU member states to push for domestic change in this area. Via the EU Code of Conduct, states agreed to the principles of harmonization and policy coordination and thereby legitimized the notion that lessons can be learned from the experiences and practices of other member states. Meanwhile, the reporting mechanisms of the EU Code of Conduct and the EU Common Position and the discussion of arms export policies at the EU level have made it easier to find out what the practices are in other EU member states.

The EU Code of Conduct and the EU Common Position have had perhaps their strongest impact in the fields of public and parliamentary transparency. In recent years, Europe has seen the most significant advances in both the number and detail of national reports on arms exports. A key factor driving this process has been the adoption of the EU Code of Conduct and the EU Common Position. As of January 2010, 21 of the 27 EU member states have published a national report on arms exports on at least one occasion, compared with four of the 15 EU member states in January 1998, the year the EU Code of Conduct was introduced.

The EU Code of Conduct and the EU Common Position oblige states to collect and report detailed information on arms exports according to a standardized format, something that many had not done before. They also helped to strengthen the norm of publishing detailed information on arms exports and helped make states more aware of transparency levels in other member states. Under the EU Common Position, states which export military equipment are now obliged to produce a national report on arms exports. The EU Common Position states that 'each Member State which exports technology or equipment on the EU Common Military List shall publish a national report on its exports of military technology.'<sup>10</sup>

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9 For complete details of current and past EU and UN arms embargoes, see the SIPRI Arms Embargoes Database, <<http://www.sipri.org/databases/embargoes>>.

10 Council of the European Union, Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, Official Journal of the European Union, L335, 13 Dec. 2008. Since 2004, the User's Guide to the European Union Code of Conduct, has stated that each member state is required to 'publish a national report on its defence exports, the contents of which will be in accordance with national legislation.' (Council of the European Union, 'User's guide to the European Union Code of Conduct on Exports of Military Equipment', Brussels, 23 Dec. 2004, p. 22.

## The outcomes of EU member state's arms export policies

The impact of the EU Code of Conduct and the EU Common Position on policy outcomes is naturally hard to measure. At the time the EU Code of Conduct was agreed, member states conveyed the impression that the adoption of these norms would lead to fewer arms export to countries problematic with respect to these norms. However, to date, there is little consensus on whether it has led to significant changes in the application of norms to actual arms exports of member states.

EU member states regularly claim to have increasingly restrictive arms export policies with respect to the agreed norms. It is also common practice among defence industry representatives to complain that other governments are interpreting the criteria of the EU Common Position less strictly than their own, leading to a loss of competitive advantage. Among NGOs and in academia, critical voices dominate. Several reports have highlighted examples of lax and conflicting interpretations of the EU Code of Conduct and EU Common Position criteria by member states.<sup>11</sup> Similarly, Neil Cooper concluded that the EU Code of Conduct amounted to little more than 'a form of weak regulatory tokenism – part of a broader process by which all but the most dubious of arms transfers (and sometimes not even those) are provided with a formal veneer of legitimacy.'<sup>12</sup>

A 2008 study sought to empirically assess the input of the EU Code of Conduct on the outcomes of states' export control policies using data from the SIPRI Arms Transfers Database.<sup>13</sup> Data on the arms exports of EU member states were analysed to determine whether there had been a detectable change in: a) the level of harmonization of member states' arms exports; and b) the level of restrictiveness in member states arms exports. Change was measured on an annual basis against indicators representing certain norms that are reflected in the EU Code of Conduct criteria. These included norms relating to human rights, conflict prevention, arms control and economic development.

The research found that the adoption of the EU Code of Conduct has had an effect on arms exports from EU member states. However, these effects were limited to the norms relating to human rights and conflict, indicating that these are more powerful than the others referred to in the EU Code of Conduct. In addition, the effects are more pronounced in terms of restrictiveness, that is, the reduction of arms exports to strong norm violators, than as regards harmonization, the reduction of variance among member states' arms exports. The research found little evidence that the EU Code of Conduct has improved harmonization among member states' arms exports, which was the original goal of the instrument.

In a way, these results make sense. The EU Code of Conduct and the EU Common Position are tools that push states in a certain direction but ultimately leave policy implementation in the hands of the states themselves. In a sense, the EU Code of Conduct and the EU Common Position

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11 Crowley, M., 'Transfers to Undesirable End Users: Loopholes in European Arms Controls', paper presented at the International Conference on Public Transparency and Arms Trade, Nyköping, Sweden, 5 May 2001, available at <[svenska-freds.se/transparency/](http://svenska-freds.se/transparency/)>; Amnesty International, 'Undermining Global Security: The European Union Arms Exports', February 2004, available at <[web.amnesty.org/library/index/engact300032004](http://web.amnesty.org/library/index/engact300032004)>; and A. Thurin, N. Marsh and T. Jackson, 'The Efficacy of EU Export Control Measures Concerning Small Arms and Light Weapons' in UNIDIR, *Small Arms and Light Weapons Transfers*, 2005, pp. 53–78, available at <[www.unidir.org/html/en/EU\\_project\\_conference.htm](http://www.unidir.org/html/en/EU_project_conference.htm)>.

12 Cooper, N., 'What's the Point of Arms Transfer Controls?' (April 2006) 27/1 *Contemporary Security Policy*, pp. 118–137, p. 121.

13 Bromley, Mark and Brzoska, Michael, 'Towards a common, restrictive EU arms export policy? The impact of the EU Code of Conduct on major conventional arms exports', *European Foreign Affairs Review*, vol. 13, no. 3. 2008

enhance officials' ability to enact policy preferences formed at the domestic level. In states where there is a desire to restrict exports to certain destinations, this would result in greater restrictiveness. In states where the political will was weaker, this would not be the case. Hence, the overall impact of the EU Code of Conduct and EU Common Position has been an increase in restrictiveness in some areas but no increase in harmonization.

## Conclusion

In conversation, government officials from EU member states tend to insist that the EU Code of Conduct and the EU Common Position have not forced any changes in domestic decision making about what and where arms should be exported. In fact, despite the stated aim of achieving more harmonized arms export policies in line with agreed minimum standards, this does not seem to be something that officials believe has been accomplished, nor is it something that they prioritize for the future.

What officials do stress is the value of the EU Code of Conduct and the EU Common Position in informing and strengthening national decision making processes. For example, officials argue that having access to decisions made by other EU member states has helped to support their licensing decisions in debates with other government departments, industry, parliamentarians and NGOs. In addition, the information provided via the information exchange mechanisms associated with the EU Code of Conduct and EU Common Position has improved the implementation of policy preferences formed at the national level or agreed in other (non-EU) international forums.

There is some evidence that assisting member states in blocking exports of SALW that are likely to be diverted to undesirable end-users is one of the key ways in which the EU Code of Conduct and EU Common Position have been used. Specifically, they have managed to serve as effective means of identifying potential diversion risks due to the amount and detail of information that states exchange - particularly on licence denials - coupled with the trust and coordination built up over the years. However; there seems to have been no corresponding decrease in transfers of SALW to destinations of concern since 1998.<sup>14</sup>

If states do wish to increase the level of harmonization in arms export policy outcomes, one crucial development would be to improve the quality and quantity of the data that EU member states exchange on their arms export licences and arms exports, thus allowing states to obtain a clearer picture of how other states are interpreting the criteria of the EU Common Position. While member states currently exchange detailed information on their denials of arms export licences, the shared information on licences approved and actual exports remains limited to that available in the EU annual report – total financial values broken down by destination and Common Military List categories and shared once a year. This allows only a limited understanding of how states are interpreting the criteria of the EU Common Position. States could also think about establishing a common understanding of which government ministries have a say in export licensing decisions and correlating this more effectively with attendance at COARM meetings.

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14 See Jackson, T., Marsh, N. and Thurin, A., 'The efficacy of EU export control measures concerning small arms and light weapons', United Nations Institute for Disarmament Research (UNIDR), *Small Arms and Light Weapons Transfers* (UNIDR: Geneva, 2005); and Trinchieri, L., *Is the 1998 Code of Conduct on Arms Exports Adequate to Support the EU's Promotion of Human Rights? Assessing the Effectiveness of Criterion 2 in Curbing the Exports of Small Arms to Third Countries*, *Hamburger Beiträge zur Friedensforschung und Sicherheitspolitik* no. 149 (Institut für Friedensforschung und Sicherheitspolitik: Hamburg, Jan. 2008).

Achieving further harmonization would entail a surrendering of sovereignty that few if any states would be willing to countenance. However, in pushing for such harmonization, NGOs and campaigners should be aware of the dangers that it brings. Harmonization is a two-way street and processes aimed at raising standards to a shared highest level can just as easily reduce them to a lowest common denominator. Again, the evidence is far from conclusive, but there are signs that interaction with the EU Code of Conduct and the EU Common Position have led certain states to liberalize their export policies towards certain destinations and regions. Harmonization and information exchange can make national authorities aware of more restrictive practices elsewhere, which can lead them to tighten up their own controls. However, they can also make national authorities better aware of more liberal policies elsewhere, which can lead them to do the opposite. Managing this balance - achieving further harmonization combined with improved minimum standards - will be the key challenge facing the EU Common Position in the years ahead.



# A European export control regime: balancing effectiveness and responsibility

Cédric Poitevin, GRIP

December 2008 was a critical month for the European arms export control regime. The European Union (EU) Member States agreed on the adoption of a Directive to facilitate arms transfers within the Community and of a legally-binding Common Position on arms exports.<sup>1</sup> The new architecture that will emerge from these decisions in the coming years is supposed on the one hand to reinforce the European defence market, and on the other hand to prevent irresponsible or illicit arms transfers to non-EU countries.<sup>2</sup> This paper briefly assesses whether there is a balance between these two aspects of the EU policy on arms trade. It first addresses the importance of EU Member States (MSs) in the global arms trade. Then, it presents the context that prevailed before the adoption of the Common Position and the Directive and the main characteristics of both instruments. Finally, the paper underlines their expected benefits as well as their potential loopholes.

The United States and Russia are currently the main exporting states for arms and military equipment and their hegemony is unlikely to be challenged by any other country in the near future. In 2004-2008, their exports respectively accounted for 30.2% and 25.4% of global totals. The three next states on the list, all of them members of the European Union (EU), lay far behind: Germany (10%), France (8%), and the United Kingdom (4%).<sup>3</sup> However, the aggregate figures of the twenty-seven EU MSs reach 33.5% of global totals.<sup>4</sup> This estimate - which includes European transfers both within and outside the Community - demonstrates that the EU, through its MSs, is really a major player in the global arms trade. Even after deduction of approximately a fourth of EU transfers which are from one MS to another,<sup>5</sup> the extra-Community exports of the EU viewed as a single entity still compete with the levels reached by US and Russian exports.

In the last two decades, concerns about EU arms transfers and their consistency with the Community foreign policy and values have resulted in several arms export control initiatives. In 1991-1992, EU MSs adopted eight criteria that national licensing authorities should take

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- 1 According to the Directive nomenclature, “transfer” covers an arms transfer within the European Union and “export” relates to a transfer from a Member States to a third country outside the Community.
  - 2 Irresponsible transfers, also called grey market transfers, are transfers that are authorized by a government, but are nevertheless of doubtful legality, at least with reference to international law (significant risk of misuse), or irresponsible in some other sense (significant risk of diversion to unauthorized recipients). Illegal transfers are synonymous with black market transfers. (...) Illicit transfers comprise both irresponsible and illegal transfers (grey/black market).” Small Arms Survey, *Small Arms Survey 2007: Guns and the City*, 2007, p. 74.
  - 3 SIPRI Yearbook 2009. Armaments, Disarmament and International Security, SIPRI, Oxford University Press, p. 330.
  - 4 SIPRI Arms Transfers Database. Accessed on 12th November 2010.
  - 5 In 2004-2008, according to the EU annual reports, 26.6% of EU MSs exports were intra-UE transfers. See the 7th, 8th, 9th, and 10th annual reports according to operative provision 8 of the European Union code of conduct on arms exports and the 11th annual report according to article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment.

into account when assessing a request for an export licence.<sup>6</sup> In 1998, they endorsed a Code of Conduct on arms exports (CoC). This instrument, which was developed by the Council's Working Group on Conventional Arms Export (COARM), was designed to set "high common standards which should be regarded as the minimum for the management of, and restraint in, conventional arms transfers".<sup>7</sup> It formalized and reinforced the eight criteria.<sup>8</sup> It also introduced operative provisions such as the exchange of information among MSs on denied export licences, a system of bilateral notification if one MS is considering a licence for an "essentially identical transaction" to one previously denied by another MS, and the submission of annual reports on arms export by each MS.

More recently, in December 2008, the EU reached what it considered a "milestone" by transforming the CoC into a Common Position (CP).<sup>9</sup> The new instrument updates and upgrades some of the CoC dispositions<sup>10</sup> but also implies two major changes. First, because of the nature of a CP, MSs are now legally bound to implement its dispositions. Second, the adoption of the text within the framework of the Common Foreign and Security Policy (CFSP) acknowledges that arms export controls are an integral part of the foreign policy of the EU and its MSs. Ironically, this major breakthrough was reached under a French Presidency of the EU. Paris, historically one of the fiercest opponents of the CoC's upgrading, accepted the need to review its position in exchange for an agreement on the so-called "European Defence Package" and particularly on one of its elements, the Directive simplifying the terms and conditions of intra-Community transfers ("ICT Directive").<sup>11</sup>

By easing transfers within the EU, this Directive<sup>12</sup> intends to help the European defence industry meet the challenges posed by the always increasing complexity of military equipment production and by the internationalisation of the industry. It introduces a complex system of licences: general licences (transfers of goods or categories of goods in one or more MS to certain recipients, such as armed forces and certified companies), global licences (multiple transfers to several recipients by one supplier), and individual licences which should remain the exception. Member States remain free to determine the products eligible for the different types of licence and to fix the terms and conditions of each licence. As recipients of general licences, companies need to be granted a certification that "establishes the reliability of the recipient company, in particular as regards its capacity to observe export limitations (...) received under a transfer licence from

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6 European Council, Conclusions of the presidency: Non-proliferation and arms export, European Council in Lisbon, 26 and 27 June 1992.

7 European Union Code of Conduct on arms exports, Brussels, 5 June 1998.

8 Criterion One : Respect for the international obligations and commitments of Member States ; Criterion Two : Respect for human rights in the country of final destination; Criterion Three: Internal situation in the country of final destination; Criterion Four: Preservation of regional peace, security and stability; Criterion Five: National security of the Member States; Criterion Six: Behaviour of the buyer country with regard to international community; Criterion Seven: Risk of diversion or re-export; Criterion Eight: Compatibility with the technical and economical capacity of the recipient country.

9 EU Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, 8 December 2008.

10 In particular, the criteria on human rights and on the risk of diversion are reinforced; the scope of activities covered by the instrument is broadened (to take into account the licence production of military equipment in third countries and brokering activities); an emphasis is put on the importance of the prior knowledge of the end use and the end-user; and each Member State is now bound to publish a annual report on its arms exports.

11 Sara DEPAUW, *The Common Position on arms exports in the light of the emerging European defense market*, Flemish Peace Institute, Background Note, 18 January 2010.

12 Directive 2009/43/EC of the European Parliament and of the Council simplifying the terms and conditions of transfers of defence-related products within the Community, 6 May 2009.

another MS.”<sup>13</sup> A company certification is recognised in every MS and has to be re-evaluated by national authorities at least every three years. Finally, companies are obliged to keep records of all transactions undertaken and must provide information when required by the national authorities. As a consequence, a growing number of defence-related products (especially parts and components) should be able to move more freely and quickly within the Community boundaries, while national authorities would still have the opportunity to monitor these transactions once completed (ex-post controls).

Ideally, the deal struck in December 2008 would pave the way for a win-win situation: on one hand, the Directive facilitates the conditions for defence-related products trade *within* the Community borders and on the other hand, the CP reinforces controls for exports *outside* its frontiers. In other words, this new architecture, which will be fully in place on 30 June 2012,<sup>14</sup> would create conditions for the European defence industry to consolidate by easing intra-Community trade of military and defence-related goods. By doing so, European arms producing and exporting companies would be more able to compete with their American counterparts and the EU and its MSs would reinforce their politico-military autonomy. The adoption of the CP is supposed to prevent irresponsible arms transfers from the EU MSs outside the Community and to reinforce harmonisation of their arms exports policies with the EU external policies and values.<sup>15</sup> By this combination of means, the tension between effectiveness and responsibility which lies at the heart of the European arms export control regime ought to be eased: the EU MSs would sell more weapons and military equipment, but in a more responsible way than before. But is this really the case? Is this new European arms export control architecture robust enough to satisfy both the desire for a strong European defence industry and the EU’s political values as a “soft power”? While it may be too early to give a definitive answer, several elements of the CP and the ICT Directive should be highlighted because of their implication for the consistency of the EU export control regime.

In many respects, the Common Position clearly represents a significant improvement for the European export control regime. Being the only legally-binding regional instrument on conventional arms transfers, it is now considered as a global model. The adoption of the CoC and its subsequent transformation into a Common Position have led to significant yet unequal improvements in the export policies of the EU MSs. Admittedly, according to a study undertaken by Mark Bromley and Michael Brzoska, the adoption of the CoC brought mixed results: on one hand, it led to a reduction of arms exports to strong violators of norms regarding human rights and conflicts, but on the other hand there is “little evidence that the EU Code has improved harmonization among MSs’ arms exports, the original goal of the EU Code”.<sup>16</sup> The CoC and the CP nonetheless resulted in improved practices in term of exchange of information and transparency (COARM meetings, regular discussions among MSs regarding sensitive destinations, publication of national and European annual reports on arms exports, etc). Member States are now account-

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13 Directive 2009/43/EC, art.9.2.

14 The ICT Directive was adopted by the EU Parliament and the Council on 6 May 2009. MS need to adopt and publish laws and procedures necessary to comply with the Directive no later than 30 June 2011. The Directive itself will be in force from 30 June 2012.

15 “The EU’s external policies, strategies, instruments and missions – overseen by the European External Action Service – have four key aims. They support stability, promote human rights and democracy, seek to spread prosperity, and support the enforcement of the rule of law and good governance. The policy mix is vast, ranging from bilateral agreements to guidelines and legislation.” *European Union External Action Service website*.

16 Mark BROMLEY and Michael BRZOSKA, « Towards a Common, Restrictive EU Arms Export Policy? The Impact of the EU Code of Conduct on Major Conventional Arms Exports », *European Foreign Affairs Review*, 2008, n°13.

able for their arms exports, which can be scrutinized by their national parliament, civil society and public opinion. This provides a basis for public discussion on sensitive destinations and on practices of concern such as brokering and corruption, and for those who wish to demand stricter export controls.

Yet the CP has its limitations. First of all, it only covers very limited aspects of arms export controls: i.e. the eight criteria and dispositions in terms of exchange of information and transparency). Other aspects are left to each MS to decide, including the structure of and the procedures implemented by national arms transfers licensing authorities. Second, the CP relies heavily on the implementation and the interpretation of each criterion by each MS: the decision to grant or not an export licence remains a national prerogative. In this sense there is no common and harmonised policy in arms exports, not even a common interpretation of the CP criteria. European NGOs regularly publish reports providing examples of contradictions and/or differences between national policies of EU MSs as well as in the practice of arms exports to countries with poor human rights records, those with a strong risk of arms diversion or re-export, and those that are involved in regional arms races, in internal conflicts, or under EU arms sanctions.<sup>17</sup> Moreover, NGOs point out that the economic and financial interests of the exporting MS often seem to prevail in the pre-licensing assessment, in contradiction to article 10 of the CP which states that these aspects cannot affect the application of the eight criteria.<sup>18</sup> The recurrence of such dubious exports raises the question of the Common Position's potential loopholes, and of its capacity to effectively prevent irresponsible arms transfers and to ensure the consistency of EU MS exports with European foreign policy and values. Besides, the 2003 EU Common Position on Arms Brokering is not implemented effectively enough by the Member States to adequately address the issue of intermediaries and transporters in the arms trade.<sup>19</sup> Finally, differences among EU MSs' policies regarding transit/transshipment controls should also be highlighted as a potential loophole in the European arms export controls regime.<sup>20</sup>

The Directive on intra-Community transfers has been designed to facilitate the circulation of defence-related products within the boundaries of the European Union. This move appears particularly relevant for parts and components which are often designed and assembled in different EU Member States. Their circulation should be facilitated by the system of general and global licences, but can be controlled as the originating Member State may still require export limitations in specific cases. Still, this new architecture of intra-Community transfers raises questions in terms of responsibility: particularly, with respect to transparency and end-use controls. As the Directive will change the way defence-related goods are controlled (from ex-ante to ex-post), MSs will only have the possibility to monitor completed transfers under general and global licences, on the sole basis of records kept by the supplying companies. In these cases, the companies' records will be the only source of information. Similarly, in the case of goods manufac-

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17 An VRANCKX (ed.), *Rhetoric or Restraint? Trade in military equipment under the EU transfer control system*, Academia Press, Ghent, 2010. See also *Good Conduct? Ten years of the EU Code of Conduct on Arms Exports*, London, 2008.

18 "While Member States, where appropriate, may also take into account the effect of proposed exports on their economic, social, commercial and industrial interests, these factors shall not affect the application of the above criteria". EU Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, 8 December 2008, art.10.

19 Holger ANDERS and Virginie MOREAU, *Arms brokering controls and how they are implemented within the European Union?*, GRIP Report, 2009/11, Brussels, 2009. See also An VRANCKX (ed.), *Rhetoric or Restraint? Trade in military equipment under the EU transfer control system*, Academia Press, Ghent, 2010, p. 78.

20 At present, there is no European common policy regarding transit/transshipment controls. Some Member States require transit licences for all military goods in transit on their national territory, whereas others would only require a licence in case of transshipment.

tured and assembled in different MSs, even though the originating MS retains the right to impose export limitations, the decision to grant the export licence will most probably be in the hands of the MS exporting the goods outside the Community.

This latter aspect of end-use controls and re-export controls is of utmost importance in the light of the often different national implementations of the Common Position on arms exports. Many NGOs point out that it could increase risks of exports being made to destinations undesired by an originating MS.<sup>21</sup> The Directive also gives cause for concern in terms of effectiveness as it faces the same challenge as the Common Position: namely, the reliance on national implementation of its dispositions. Indeed, the Directive's effectiveness and added value will heavily depend on the level of harmonisation between the national regulations adopted by each MS on many aspects: which goods are subject to individual licences, under which conditions companies can be certified, and so on. At the end of the day, an insufficient harmonisation of these core aspects of the Directive may prove counterproductive and result in more administrative and practical hurdles not only for national authorities but above all for companies. In particular, the biggest companies active in different MS, which should be the first beneficiaries of the Directive, may be exposed as they will be dealing with different administrative processes and conditions depending on the MSs involved in a transaction.

The tension between preventing irresponsible arms transfers and promoting the interest of armament companies has always been central in arms export control discussions among Member States. On one hand, the EU and its MSs underline their responsibility as arms producers and exporters and their willingness to promote EU values of human rights and democracy. On the other hand, arms trade is generally considered as a business like any other by EU MSs, whose goal is to expand and gain market shares. In the present context, such a tension increasingly appears as an inner contradiction. Moreover, the Common Position and the ICT Directive do not seem capable of reaching their goals of increased responsibility and effectiveness in EU arms exports controls. The Common Position on arms exports has led to significant yet unequal improvements in EU MSs' export policies, particularly in terms of exchange of information, transparency, and accountability. However, there is little evidence that the CP and its predecessor, the CoC, have fostered harmonisation of EU Member States arms export policies. Besides, EU countries continue to authorize questionable transfers.

In the light of these limitations on the effectiveness of the CP, one may wonder whether the adoption of the Directive of intra-Community transfers constitutes a bridge too far. Indeed, some of its dispositions designed to facilitate the arms trade within the EU raise questions in terms of transparency and respect of end-use and end-user restrictions. Finally, both instruments barely constitute as much as a general framework for arms transfer controls within and outside the EU; many of their detailed dispositions are left to the Member States to transpose at the national level and to implement. Therefore, their effectiveness will greatly rely on the Member States' willingness to harmonise their legislation and procedures. Reinforcing harmonisation of national policies is pivotal for adopting a more consistent EU export controls policy. However, as long as the export licensing decision remains a national prerogative, there will be differences about what represents a "responsible" policy with regard to exporting arms.

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21 Such risks already exist even though the ICT Directive is not implemented. The originating MS may not be willing or able to identify the actual end-user of a given arms transfers and, accordingly, may rely on the MS which exports the goods outside the Community. See for instance Luc MAMPAEY, *Commerce d'armement triangulaire Belgique-France-Tchad : limites et lacunes de la réglementation belge et européenne*, GRIP Analysis, 2008.



# The EU as a watchdog for responsibility in the field of arms control

Professor Dr. Quentin Michel, University of Liège

In order to act as a watchdog in the field of arms export, the EU should have a clear common policy as regards different international instruments designed to regulate arms transfers. Such a common policy would have to be based on the EU arms export control regime which would establish strict rules, including decision making processes, equally implemented throughout the EU territory.

In contrast to the arms export control regime, the one for dual-use items is often presented by the EU and its Member States as a comprehensive and integrated system. Since 2004 different outreach activities organized by the Council all over the world have tended to give such an impression. Nevertheless, this understanding remains questionable, as even the dual-use items export control regime remains essentially coordinated by the Member States. This does not necessarily mean that the EU could not act as a principal player to strengthen the efficiency of international arms control. Moreover, different actions undertaken by the Council to promote the conclusion of the Arms Trade Treaty along with its continuous support of the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects demonstrate the will of the EU to intervene in this area.

The present contribution intends to demonstrate that even if we are still at the beginning of a long process, the European Union can be assessed as a significant player in a field of arms control, taking into account that the EU has already attempted to establish a single export control regime and has thus moved beyond simple coordination of national export control legislations. Nevertheless, this role consists essentially in a compilation of Member States' actions, expressed at best by the President of the EU Council and the High Representative for Foreign and Security Policy.

## In the beginning

Since the Treaty of the European Economic Community (EEC), arms export has been considered by Member States as one of their exclusive competencies. Any attempt to coordinate their national policies was firmly rejected, even if they were all parties to the same international export control regimes dedicated to arms and related items.

The situation might appear unusual, considering that international instruments such as COCOM have been *de facto* coordinating and constraining national policies. This regime established by NATO countries in the early fifties required Participating States to consult the group before granting an export authorisation; moreover, each participant held the right of veto.

In spite of this and probably due to the fact that - contrary to the commerce in coal and steel - arms trade was essentially ruled by foreign policies, the EEC Treaty contained an exception that authorized each Member State to take such "*measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms,*

munitions and war material”.<sup>1</sup> The substance of this provision has neither been abolished, nor fundamentally amended, at the different stages of institutional reforms which have led to the establishment of the European Union.<sup>2</sup> Even if the Council has informally listed arms and related material falling under this exception, since 1958 this list has never been published nor amended.<sup>3</sup>

The scope of listed items is rather broad; it actually goes from portable and automatic firearms to warships. Moreover, this list cannot be considered as comprehensive so long as category 13, titled “*Other equipment and material*”, includes non-listed items that remain subject to Member States’ evaluation.

In 1997 a direct reference to the list was made by the Amsterdam Treaty. It stipulated that “[t]he Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply”.<sup>4</sup> However, in the absence of a comprehensive and legally binding list of arms, Member States have decided either to maintain or to adapt national lists. Such lists could include very broad ranges of items not necessary intended for military purposes *strictu sensu* but considered sensitive by national authorities.

The development of a kaleidoscope of national export control regimes did not really affect the efficiency of the EU’s non-proliferation policy since custom controls were maintained between Member States. In addition, both transfers of weapons within the Community and those undertaken between EU Members and third States were submitted to authorisation. Consequently, if an export of weapons or related items was not subject to authorisation in one Member State, it was not possible for an operator to undertake a transfer from a Member State where that specific item was controlled to the one where it was not without an authorisation by the first Member State.

### Single Market dynamics and attempts at regulation

The situation changed with the implementation of the common market in January of 1993, and in particular with the abolition of systematic custom controls at internal borders. Even if *de jure* the situation did not change for intra-Community transfers of arms and related items, and they were still subject to authorisation, several concerns were raised about how economic operators would respect this requirement in conjunction with the *de facto* free movement of goods stemming from the abolition of custom controls within the Community. Thus one could not underestimate the risk that an operator could carry out an illicit transfer of weapons from one Member State where an export authorisation was required to another where such obligation did not exist, and then export the product to a third State without a authorisation.

To counter such risks, the European Commission tabled several proposals to regulate and coordinate the application of the Treaty exception relative to the trade in arms and related materials. The assessment of the lists adopted by international export control regimes, implemented and completed on a national basis, showed that Member States were using the Treaty exception

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1 See article 223 of the EEC.

2 This provision is henceforth included in article 346 of the Treaty on the Functioning of the European Union.

3 Decision defining the list of products (arms, munitions and war material) to which the provisions of Article 223(1)(b) of the Treaty apply (doc. 255/58). Minutes of 15 April 1958: doc. 368/58.

4 Article 296(2) of the Treaty establishing the European Community as amended by the Amsterdam Treaty.



basically for two categories of items. The first category included so-called conventional weapons, thus combining firearms and the seven categories of large weapons defined by the UN Register of Conventional Arms.<sup>5</sup> The second category was constituted by the recently designated dual-use items. These items are in fact goods and technology that have mostly civilian applications but could also contribute to the production of weapons, in particular to Weapons of Mass Destruction (WMD).

### Dual-use items

Arguing that dual-use items could not fall under the Treaty exception so long as this exception was not applicable to “*products which are not intended for specifically military purposes*”, the European Commission tabled a proposal to adopt a regulation, a legally binding instrument of the EC, establishing a common export control regime for dual-use items defined by five international regimes (NSG, Australia Group, Wassenaar Arrangement, MTCR and Zangger Committee). This proposal could be considered as the first step towards the creation of an EU dual-use items and arms export control regime. Even though its field of implementation did not include the Wassenaar munitions list, it was the first aggregated list of items controlled by major international export control organisations. Moreover, it was translated into several major international languages such as Spanish, English, French and German.

A majority of Member States reacted negatively and rejected the Regulation proposal. The main argument was that arms and dual-use trade are both constrained not only by commercial policy considerations but also by those of foreign policy, which are barely included in the Common Commercial Policy. Therefore the Treaty exception has to be understood broadly, granting Member States the right to legislate and define the list of items and criteria involved. In view of the need to avoid proliferation risks resulting from the implementation of the common market, the Member States could only accept a solution involving adoption of two separate instruments, i. e. a politically binding one to coordinate their policies and a legally binding one to establish technical elements.

Hence the CFSP Joint Action introduced, on the one hand, a common list of items to be submitted to export authorisation and, on the other hand, a list of common criteria to be considered by Member States authorities when analysing the licence application. The EC Regulation established the necessity to obtain an authorisation, the territorial coverage of authorisation, a list of categories of authorisations, the licensing authority, specific elements of customs procedure, and so forth. In order to emphasize that the EU export control regime, although based on two legal instruments, constituted one single regime, the preamble of each document stated “[...] *the afore-said joint action and this Regulation constitute an integrated system*” (and vice versa).

Even if the original intention was to establish an integrated system, this approach reflected Member States’ vision of the limits of Common Commercial Policy in the field of sensitive items. By drawing the line between Community and Member States’ competences, Member States clearly attested the incapacity of the Union to regulate these matters. Besides, they insisted that the Treaty exception must be understood broadly, in other words it covered not only the category of items considered as strategic in terms of foreign policy considerations but also the criteria and conditions for authorizing their export or not.

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5 For more information see the website of the United Nations Register of Conventional Arms available at <http://disarmament.un.org/cab/register.htm>.

If this so-called integrated system matched with Member States' interpretation of the division of competences, it confused the understanding of the system by third countries. Furthermore, it did not grant any political legitimacy to the European institutions to act within international export control regimes.

The integrated system was rapidly invalidated by the European Court of Justice (ECJ). In 1994 two preliminary rulings of the Court confirmed that the domain of dual-use items along with rules restricting the exports thereof to third countries fell within the scope of the Common Commercial Policy.<sup>6</sup> Moreover the Court emphasized that *“a measure (...) whose effect is to prevent or restrict the export of certain products, cannot be treated as falling outside the scope of the common commercial policy on the ground that it has foreign policy and security objectives”* and that article 207 of the TFEU *“is to be interpreted as meaning that rules restricting exports of dual-use goods to non-member countries fall within the scope of that article and that in this matter the Community has exclusive competence, which therefore excludes the competence of the Member States save where the Community grants them specific authorization”*. It also ruled that the fact that *“a trade measure may have non-trade objectives does not alter the trade nature of such measures”*. Besides, *“the fact that the restriction concerns dual-use goods does not affect that conclusion. The nature of those products cannot take them outside the scope of the common commercial policy”*.

Consequently, the Commission drafted a proposal for a Regulation which encompassed all the elements of the Joint Action. More than two years were needed to convince several Member States to accept the ECJ's interpretation of the distribution of competencies. Finally the new Regulation was adopted in 2000; but it still could not be considered as a unitary export control regime.<sup>7</sup> The decision to grant an authorisation remained strictly a national competence. Thus Member States were authorized to extend the list of controlled items, to restrict the movement of dual-use goods within the EU, to establish new categories of authorisations, to extend the catch-all clause mechanism, to impose specific conditions, etc. The extent of the aforesaid provisions reveals that Member States were not prepared to transfer competence to the EU.

On the other hand, partially under pressure from the ECJ, the Regulation established a set of essential elements of a single export control regime: a single list of items to control, a non-exhaustive list of criteria to be considered by national authorities, a community-wide validity of authorisation, several binding and non-binding consultation mechanisms, and a catch-all clause. Surprisingly, the Regulation also contained a number of provisions not compelled by the ECJ's interpretation, indicating that the idea of a single export control regime had not been completely rejected. The most striking example is the Community General Export Authorisation which is directly granted by the EU Regulation. It allows all EU operators to export a large scope of listed items to specific countries without applying for a national authorisation.

If the recast of the Regulation did not fundamentally change the situation, the present discussion of the Regulation proposal aimed at creation of six new CGEA (Community General Export Authorisation) has reopened the debate on the establishment of a single EU export control regime for dual-use items.<sup>8</sup>

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6 See Case C-70/94, *Fritz Werner Industrie-Ausrüstungen GmbH v. Germany* [1995] ECR I-3189; Case C-83/94 *Criminal Proceedings against Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer* [1995] ECR I-3231.

7 Council Regulation (EC) No 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology (OJ L 159, 30.6.2000, p. 1).

8 Proposal for a Council Regulation amending Regulation (EC) No 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology, COM(2008) 854 final, Brussels, 16.12.2008.

Considering Member States' reluctance, the chances of creating a field of action for the EU institutions, in particular for the Commission and the Council, remain rather poor notwithstanding the recommendation in the Thessaloniki Action Plan of 2003<sup>9</sup> for the EU to become a leading cooperative player in international export control regimes for dual-use goods. The same considerations might be applied to the possibility of the EU's speaking with one voice within international export control organizations or its interaction with third States. For the time being, the Commission is only a member of the Australia Group, although it also holds the status of observer within the Nuclear Suppliers Group. The Council Secretariat is represented within the delegation of a Member State holding the rotating EU Presidency. Therefore, the profile of the EU in such bodies is principally conditioned by the willingness of the given EU Presidency to act *qua* Presidency, or purely as a Regime State Party. It remains to be seen whether the European External Action Service established by the Lisbon Treaty can change the situation regarding EU interaction with international export control regimes and third states.

### Defence-related equipment

Although recognised by the Treaty, the EU competence for dual-use items has thus still hardly been recognised by Member States; while in the conventional arms domain the adoption of legally binding instruments, such as a Regulation, is clearly excluded by the Treaty. Nevertheless, acting in the first instance in the margins of the Common Foreign and Security Policy, the Council managed in 1991 to adopt a statement defining a non-exhaustive list of criteria to be considered by Member State authorities when analysing an export application for defence-related equipment. This Statement did not define a list of arms and ammunition to which the criteria were applicable, nor did it refer to the list adopted in 1958 to define the content of the Treaty exception. A few more years were necessary to find a consensus between Member States. Finally the EU's own list of military items was adopted in 2000,<sup>10</sup> and in 2008 the Statement was transformed from a Council Decision into a Common Position.<sup>11</sup>

Similarly to the dual-use domain, the possibilities, on the one hand, of creating a sphere of action for the EU institutions and, on the other hand, of speaking with one voice within international export control regimes or in interaction with third States regarding the trade in conventional arms cannot be assessed as very high. In various arms trade-related fora, the EU generally operates through the adoption of a Council Common Position or a statement issued by the rotating Presidency in charge. Such statements are essentially designed to support the relevant negotiating process, which nonetheless remains dominated by Member States acting on a national basis. In addition, various meetings might be organized among Member States in the margins of the negotiation to coordinate national policy.

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9 Council of the European Union (2003), *EU strategy against proliferation of weapons of mass destruction*, 15708/03, Brussels 10 December 2003.

10 Council Declaration of 13 June 2000, issued on the occasion of the adoption of the common list of military equipment covered by the European Union code of conduct on arms export (OJ C 191, 8.7.2000, p. 1). Now replaced by the Common Military List of the European Union adopted by the Council on 15 February 2010 (equipment covered by Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment) (OJ C 69, 18.3.2010, p. 19).

11 Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment (OJ L 335, 13.12.2008, p. 99).

## Comparisons and conclusions

The comparison of the EU arms and dual-use export control regimes brings out the fact that aside from a few elements, the two systems do not differ fundamentally. Both of them establish a list of items to be controlled, a list of criteria, a consultation mechanism and the necessity to obtain an authorisation. A common territorial scope and a Community General Export Authorisation are the sole elements specific to the dual-use export control regime.

This leads to the conclusion that even when the EU has legal grounds to regulate the control of its international trade, the Member States are still not ready to accept constraints upon their export policies going further than certain forms of coordination. Therefore, the idea that the EU could act as a watchdog in the field of arms export control does not seem to fit Member States' expectations. The situation might be considered differently, however, if we were to form a full picture of measures taken by Member States acting not necessarily within the framework of the EU. In other words, if we sum up the national arms export policy of the 27 Member States, the result might appear rather stricter than the EU common policy.

## *Section 3: The European directive on intra-EU trade in defence equipment and the challenge of control*

The third section pulls together both themes of the previous sections – a common defence market and a European arms export control regime. It focuses first on the EU Directive 2009/43/EC – also known as the directive on intra-EU trade in defence equipment – which simplifies the terms and conditions of transfers of defence-related products within the Community, and forms part of the European defence package approved at end-2008. The European defence package consists of two directives that lift aspects of the regulation of internal arms trade and defence procurement from the national to the European level. Regarding trade controls, the directive aims at liberalizing trade in military goods within the EU. Intra-EU trade in defence-related products is not exempted from licensing, but the licensing system is to be simplified, which will significantly ease the administrative burden both on government and the defence industry. In summary, the Commission proposes to replace the current system of individual licences, whereby an individual licence is required for each transaction, by a system of general and global licences allowing one licence to cover several transactions. The export of military goods to countries outside the EU is not covered by this directive: such exports will continue to be regulated by national legislation under the CFSP Common Position already described.

An evaluation of this specific legal instrument offers insights into the opportunities and challenges of a common defence market both for the European defence industry and for the European export control regime. The first chapter in this section, by Hans Ingels, describes the long road towards the adoption of the directive; the motives for establishing an EU licensing system for intra-EU trade; and the expected consequences of the directive. This directive is aimed at breaking down trade barriers within the EU, stimulating joint production projects and making EU defence companies more competitive. However, the directive is far from perfect and its success depends to a large extent both on good cooperation between member states and on responsible business behaviour.

The second contribution by Sara Depauw assesses the risks of the directive in terms of transparency and export controls. Is a common market with lower trade barriers for military equipment expected to steer the EU towards more harmonised export controls, or will this pose new challenges for the European export control regime? The directive has important consequences for public and parliamentary oversight of trade in military equipment within the EU and for control on exports to countries outside the EU. The author describes why transparency is crucial – above all in the field of arms trade – and how the directive risks undermining this. Secondly, the directive presumes trust among member states regarding the quality of their export control policies to non-EU countries, as the newly installed licensing system is built on mutual recognition of national export licences. Unfortunately, however, the decisions of national authorities on export licenses are too often informed by national interests. Since the EU has taken no clear positions – aside from arms embargoes – regarding (i) legitimate countries of destination and end-use, the EU cannot fill the gap in cases when national export control policies of its member states diverge. The effectiveness of export controls by some member states therefore risks being undermined by others, with consequences that would be likely to affect Europe's overall image and security.



# The intra-EU defence trade directive: positive goals

Hans Ingels, European Commission<sup>1</sup>

*Directive 2009/43/EC 'simplifying terms and conditions of transfers of defence related products within the EU' is meant to break down trade barriers within the EU, stimulate common production projects and make EU defence companies more competitive. How effective is the Directive expected to be? To what extent will there be a shift from individual and global licenses to general ones for intra-EU trade? Will this Directive influence national licensing systems profoundly, making them more convergent, or less so? Are there anomalies in the Directives that may jeopardize the intended goals?*

## 1. The long road to a licence...

At the moment, all Member States restrict the circulation of defence-related products within the Internal Market. They all share the same concern: defence equipment should not end up in hostile hands or with “rogue governments”. This concern remains acutely valid today with the threat of terrorism and the risks of proliferation of weapons of mass destruction. All Member States are thus implementing a series of control tools to balance non-dissemination imperatives with the necessities of production and circulation of defence material with trusted partners.

A common feature shared by all Member States is *the reliance on prior licensing schemes* to manage transfers of defence equipment to other Member States. In practical terms, this means that manufacturers have to obtain a national ex-ante “export licence” for shipping defence-related goods outside the national borders of each Member State. No distinction is currently made as to whether the destination is another Member State or a third country.

Each individual or global licence application is normally dealt with on a case-by-case basis, obviously taking into account the relevant UN and EU arms embargoes as well as relevant multi-laterally binding restrictions.

For both economic operators and authorities, the licence granting procedure is time-consuming and resource-intensive, for the following reasons:

- a. *Overlapping scope of activities*: there is a wide variety of national administrative arrangements for issuing export licences. Their complexity is often the reason for delays and bottlenecks in certain Member States. The relevant authority responsible for approving licence applications may also depend on the type of goods or technology involved.
- b. *Inter-agency process*: the authority responsible for issuing licences is typically required to consult other government departments before reaching its final decision. This final decision can also be taken at the level of an intergovernmental board.

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<sup>1</sup> Hans Ingels, European Commission – Enterprise and Industry DG. The opinions expressed in this article only reflect the personal views of the author.

- c. *Lack of transparency in licensing criteria*: in some Member States, the criteria that need to be fulfilled to obtain a license are not defined by law and are entirely left to the discretionary assessment of the responsible authority. For the supplier and the receiver, this lack of transparency jeopardises the predictability of transfers and can imply additional delays in finalising incomplete applications.
- d. *Administrative licensing fees*: some Member States impose a fee to cover the cost of the administrative procedure.
- e. *Additional licensing and pre-licensing requirements*: in some Member States additional licences/permits need to be secured before being able to apply for an export/import/transit licence.
- f. *Diversity in control lists*: most Member States have their own national list for defining which products are considered as military materials. Whilst usually based on the Wassenaar Arrangement, most of these national lists contain a series of added items. These differences can lead to complex situations (e.g.: a specific item can be freely traded in one country but is subject to controls in another). A pan-European company transferring defence components between its subsidiaries located in three Member States must deal with three different control lists.

The duration of the administrative licensing process may vary from one week to several months, depending on Member States and the circumstances involved. These delays clearly have a negative impact on the defence industry, as in this day and age efficient time management is a cornerstone of any industrial project.

Overall, licensing requirements impose significant administrative burdens on companies, and imply long lead times which can be up to several months.

## 2. Why do we need a reform?

A prerequisite for deeper industrial integration is the reasonable guarantee that European producers and customers will benefit from an *efficient, seamless and reliable supply chain* whenever acquiring equipment in another Member State.

At an industrial level, the need to conform to different national licensing regimes hampers the optimization of supply chains. To avoid time-consuming, uncertain and costly procedures, companies do tend to prefer national suppliers. This impedes the specialisation of European defence industries and generates obstacles to the creation of economies of scale. Furthermore, pan-European companies cannot enjoy the full benefits of cross-border integration so long as data transfers between a company which is based in one Member State, and its subsidiary in another, remain subject to complex and lengthy prior approval schemes.

Security of supply is also of paramount strategic importance in *government procurement*. The adequate and timely supply of defence equipment is essential to the success of military operations. This implies that suppliers must have the capacity to deliver defence equipment (including spare parts, maintenance and upgrades) over a long period of time - given the long life cycles of many defence systems. In addition, in times of crisis or war, suppliers must be able to meet urgent additional demands for increased or accelerated deliveries.



The tendering authority of an EU government cannot take it for granted that export licences will be issued if it wants to procure defence equipment from a supplier established in another Member State. Although licences are hardly ever refused, the “theoretical” possibility that this may happen is an incentive for Member States to prefer sourcing sensitive military equipment from a national producer rather than (perhaps on more advantageous terms) from its European competitors.

### 3. The consequences of the Directive

#### 3.1 Reduced administrative burden

At the moment, the bulk of intra-EU transfer licences remains largely made up of individual licences. The Directive, through its lighter authorisation schemes, should substantially reduce the corresponding administrative burden for licensing authorities and companies, whilst meeting legitimate security objectives. A simplification of intra-EU transfers will automatically reduce the need to prepare and examine submissions for obtaining individual licences. The most significant consequence is expected to be the reduction in executive time diversion (on paperwork and contacts and negotiations between companies and competent authorities).

It is widely acknowledged that the existing industrial defence capabilities of SMEs in the EU are not fully exploited. Among the factors that explain such under-exploitation are the long delays needed for reorganizing supply chains and the lack of mutual awareness between both suppliers and system integrators whose working methods and legal obligations have forced them to deal with national undertakings. However, the administrative burdens involved in transfers also play a role. Smoother and more predictable transfers will give defence system integrators an incentive to outsource the production of certain sub-components to specialised SMEs with niche capabilities, rather than resorting to in-house development. Furthermore, SMEs are expected to greatly benefit from facilitated intra-EU transfers: such enterprises are typically disproportionately affected by licensing burdens, as they have more limited resources and expertise to tackle complex rules.

#### 3.2 General licences

General licenses, or national general authorisations, provide for a simplified procedure for the export of controlled goods to certain destinations. These licences will be published in a legal or administrative general act. The scope, the conditions of possible use and any potential destination restriction will be specified within the licence itself. Any exporter fulfilling the prescribed conditions can benefit from the authorisation to transfer the corresponding items without further prior administrative action.

For most Member States, the general licence is a novelty. Most Member States do not provide for this type of licence and some of those who do, have not used it. The United Kingdom, however, is widely implementing general licensing for military goods under Open General Export Licences (OGELs). These OGELs allow the export of specified controlled items by any exporter, removing the need for them to apply for an individual licence, provided the shipment and destinations are eligible and the conditions are met. All OGELs remain in force until they are revoked.

### 3.3 Global licences

Global licences are company-specific prior authorisations for shipping specific products (typically the products listed in the company's catalogue) to one or several specified recipients. Their main potential value for simplification resides in the fact that they are not specific to a precise shipment and thus can be used several times to covers similar transfers. Global licences are typically not linked with quantitative limits and are valid over a relatively long period (3 years). They are particularly helpful in the case of routine shipments of equipments to habitual customers or for SMEs with a limited catalogue.

Experience in certain Member States has shown the real potential of global licence schemes to simplify matters. For example in 2002 France introduced the option of global licences based on the catalogue of the participating companies (targeting more specifically SMEs). The first 35 licences delivered replaced not less than 1,250 individual licences, thus representing a cut in red-tape by a ratio of 36. Similarly, during the preparatory phase for the Directive, Romania quoted its national experience where 7 global licences have replaced over 700 individual licences. The benefits in cutting red-tape will differ substantially according to each Member State. Logically, these benefits will be minimal in those Member States that have already introduced - and are making a standard use of - such simplified global licence schemes, whilst a reduction of the number of licences by at least a factor 10 could reasonably be expected in those Member States starting from scratch. Against this background, the assumption of a 50% reduction in overall associated administrative burden appears to be a very conservative minimum figure. There is a small risk that certain Member States may define their global licences in such restrictive terms that these remain in essence very close to individual licences. But a Member State acting in such a way would be placing its own industry in a difficult competitive position for no reason.

### 3.4 Certification of recipient companies

Certification of recipient companies will contribute to the facilitation of intra-EU transfers, insofar as this tool provides Member States with 'guarantees' concerning the recipient company's experience in defence activities, its record of compliance with relevant legal requirements (notably in the field of re-exportation), and the reliability and quality of its internal control programmes and structure. In particular, certification conveys recognition that appropriate risk prevention measures are implemented to protect goods, including intangibles (technologies, know-how, software...).

The Directive provides for common certification conditions across the whole territory of the Union. In other words, a certified enterprise may be located in any EU Member State without being considered as less safe because of its location. For such enterprises, a certification would be extremely precious as one would expect them to make great efforts to maintain their reputation and business.

Certification could also contribute to providing the USA with greater assurance against the risk of illicit technology transfer in the event of collaboration with European companies, thus enhancing mutual trust. Indeed, certification would *inter alia* cover traceability and reporting on re-exportation to the Member State of origin - issues considered by the US authorities as prerequisites for any softening of its International Traffic in Arms (ITAR) rules. (A limited set of EU Member States currently benefit from a ITAR relaxation, and the US industry is in favour of introducing more flexibility in the US export regime). A solid certification system could therefore indirectly

help convince the US authorities that EU certified companies are reliable partners who can offer satisfactory guarantees on the proper end-use of US products.

In most Member States, defence companies are already *de facto* or *de jure* undergoing - in one form or another - certification procedures in order to be allowed to pursue their activities. For example, French companies must obtain a “licence for manufacturing and trading – *autorisation de fabrication et de commerce*” whilst UK companies are invited to implement a “compliance programme for exporters”. As a consequence, a new EU certification scheme should most probably either fit within, or supersede existing national requirements, thus avoiding a double layer of certification and thereby reducing the net cost of the new scheme.

Commission Recommendation 2011/24/EU of 11 January 2011 on the certification of defence undertakings under Article 9 of Directive 2009/43/EC [OJ L11 of 15 January 2011, p. 62] provides for guidelines on the certification criteria. Its main objective is to ensure a convergent interpretation and application of the certification so that the certificates referred to in article 9(6) of Directive 2009/43/EC can be more swiftly mutually recognised.

#### 4. Are there anomalies in the Directives that may jeopardize the intended goals?

Directive 2009/43/EC is certainly not perfect and its success depends to a large extent upon good cooperation between Member States. To give a few examples:

- The success of the general licence will depend on its scope, which Member States may decide autonomously. Some Member States may be tempted to adopt a very short list of defence-related products that are subject to a general licence.
- The recognition of licences between Member States could meet language barriers. Administrative cooperation between controlling authorities will have to be strengthened in order to avoid misunderstandings for licences drafted in another language.
- The motivation of a company for becoming certified will depend on its role in the supply chain and on the licensing practice in the supplier’s Member State. There is no point in seeking certification if the component or sub-system in question is subject to a global or individual licence.

Will the Directive entail less transparency? Transparency is crucial for striking the right balance between an internal market free of unnecessary barriers, and the need to protect public security. Some argue that the directive will entail loss of transparency for the licensing authorities. Yet the mere fact that it is national authorities who decide to submit certain types of products to a general licence, or to grant a global or individual licence, allows them to control which suppliers will deliver defence-related products to recipients in other Member States. Moreover, the directive contains several reporting obligations for suppliers. There can be little doubt that the directive will in fact strengthen transparency, since all Member States will be obliged to introduce harmonised licensing systems, while all suppliers of defence-related requirements will have to apply harmonised reporting requirements.



# Risks of the ICT-directive in terms of transparency and export control

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## Introduction

This paper discusses some potential effects and outcomes of the directive of 6 May 2009 on simplifying terms and conditions of transfers of defence-related products within the Community (2009/43/EC) (further referred to as the directive on intra-community trade or ICT directive). From a parliamentary perspective, issues regarding transparency and control on end-use require particular attention.

First, the political context in which the directive on intra-EU trade came to fruition will be introduced. Next, reference will be made to the European regulation on trade in dual-use items, since this regulation has certain resemblances to the ICT directive and offers insights that might inform EU policy on military equipment. The third part is a critical assessment of the directive, focussing on likely effects for transparency and for control on end-use.

## Political context of the directive on intra-EU trade

Arms trade is a policy area lying at the crossroads of foreign and security policy and economic policy. The strategic importance of arms trade is widely acknowledged: production and trade in military equipment enables state and non-state actors to wage war, to gain power, to protect citizens and to guard the political order. In times of war, the defence industry is a close ally to combatant parties. In times of peace the pursuit of gain of the defence industry is dependent on sustained investments of governments in R&D, procurement of defence equipment and exports to other countries. As defence budgets are shrinking, the importance of export increases. In addition, there is a clear trend towards exploring new markets such as the security market.

Governments have conflicting interests when it comes to their defence industry. For strategic reasons (security of supply) and economic benefits (a high-tech industry that generates employment), the maintenance of the defence industry is important to most governments. Accordingly, when it comes to managing security risks and weighing economic interests, control on arms trade is sensitive and often contested. It is a political minefield where economic, ethical, and security considerations come into play.

The lobbying efforts directed by the defence industry at decision-makers have been intense. The increasingly transnational dynamics in the defence market prompted growing calls from industry for more coordination at EU level in order to facilitate cross-border cooperation within the EU. Lower trade barriers for intra-EU trade in military goods were deemed necessary in order to remain competitive in relation to other defence markets (e.g. the US). Market imperatives called for a common European regulatory framework in order to guarantee equal competition for defence companies in European defence markets. A fragmented legal framework with national

export restrictions to trade strongly hinders the development of an internationally organised defence industry with holdings and production sites based in several countries.<sup>1</sup>

The European Commission has tried for years to break down nationally protected markets and stimulate the liberalization of the European defence market, equal competition, security of supply etc. Steered by the defence industry and supported by rulings of the European Court of Justice, a breakthrough was achieved with the “defence market package” in 2009. Does this mean that member states now care less about their national sovereignty? Not really. The competence on arms exports remains in the hands of member states; but for intra-EU trade, liberalization turned out to be more convincing than considerations of national sovereignty, control and protectionism. Member States felt the need to ease administrative burdens and gain competitiveness, and therefore agreed to open up their markets.

The ICT directive forms part of the broader European defence package that consists of two directives lifting relevant aspects of regulation on arms trade and defence procurement from the national to the European level. Both directives are aimed at stimulating cooperation among EU defence companies and creating a European “level playing-field”. The goal of the ICT directive is to simplify the licensing system which will significantly ease the administrative burden both on the government and the defence industry and should – in the long run – lead to the equalization of trade barriers for EU defence companies. The other directive concerns procedures for the award of contracts in the field of defence and security and aims to ensure more open competition for all EU defence companies.

### Preceding European legislation on transfers and exports of dual-use items

The ICT directive was inspired by existing cooperation agreements between a few EU member states such as the 6-nation Letter of Intent Framework Agreement. In this cooperation agreement, liberalized procedures were foreseen to ease trade in defence equipment between partners in defence projects in order to stimulate common procurement programmes. By proposing the ICT directive, the European Commission intended to open up this licensing procedure to all EU member states.

Another source of inspiration was found in the EU legislation for trade in dual-use items. Contrary to military items, dual-use items are not specifically designed for military use. They consist of civil products that are mostly used in civil applications but could also be used/applied for military purposes, including for weapons of mass destruction, and are therefore placed under control. Since the ICT directive resembles the licensing system adopted in the EU dual-use regulation 428/2009 in several aspects, experiences of this regulation might be informative for the study of the ICT directive.

First, compared to the dual-use regulation 428/2009, the directive on intra-EU trade in military equipment is more cautious. Trade in military equipment within the EU is not free from licence as it is for most dual-use items (except the most sensitive ones, including nuclear materials). Instead the EU has adopted a common licensing system that combines general, global and individual licences. All companies on a Member State’s territory can – in compliance with certain conditions

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<sup>1</sup> Bromley, M. (2008), *The impact on domestic policy of the EU Code of conduct on arms exports, the Czech Republic, the Netherlands and Spain*, SIPRI Policy Paper no. 21, p 5.

– make use of the general licenses issued by this Member State. Global licences are issued to individual companies for a number of transfers to (possibly) a number of destinations. Individual licences will remain, but are to be used only for sensitive intra-EU transfers. The EU licensing procedure will become less stringent than previous national procedures, but intra-EU trade in defence equipment will still be subject to official control.

Second, other than for dual-use items, the regulation of exports of military equipment to non-EU countries is excluded from EU legislation. Member States remain fully competent for such trade with third countries. At the time when the defence market directives were proposed, the European Commission argued that member states were not ready to transfer competence over arms exports to the EU level (see *infra*). The liberalization of arms trade within the EU has thus not been accompanied by common rules for exports to non-EU countries. Member States have indeed adopted a Common Position on arms export controls (2008/944/CFSP), and made a serious effort to harmonize their export control policy, under the CFSP; but exports to non-EU countries do not form part of the common commercial policy.

Third, the legislative instrument chosen to regulate intra-EU arms transfers – a directive – leaves more room for discretion than a regulation. The legal basis of the directive is art. 114 TEU (former art. 95 TEC) which aims for more harmonisation in the functioning of the common market. It allows national legislation to remain in place, though it needs to be in line with the European directive.

The reason for these diverging policies is the different nature of dual-use items and military equipment. Although dual-use items might pose even higher risks for proliferation of weapons of mass destruction, the majority of this trade is destined for civil use. Along the lines of ‘building higher walls around a smaller yard’, the transfer of competences to the EU and the adoption of a European regulation which assures free trade of less-sensitive items in this field was supported by member states. Trade in military equipment is by definition destined for military use, and their integration in the common market is therefore less evident.

### Assessment of the directive

In this phase of the legislation process, member states need to implement the directive in their national legislation (by the end of June 2011 national legislation should be in conformity, and by June 2012, the measures should enter into force). Several member states, like Belgium, are taking the opportunity to renew outdated legislation. The directives of the European Union establish an external benchmark, create external norms to adhere to, and provide an external deadline to renew national export control regimes.

Nevertheless, the text of the directive itself results from a compromise amongst the Commission and 27 member states (amendments made by the European Parliament were rather modest). Considerable room for discretion was left to the member states as a result. This eased the adoption of the directive, but complicates its implementation and increases the risk of maintaining/creating obstacles to a harmonised policy. Several articles are formulated as options for member states, such as the possibility to exempt certain transfers from license obligation (article 4.2), the nature of defence related products for which general/global licences may be used, or the export limitations that may be applied (art. 10). The leeway left for member states is not necessarily a blessing: it may leave them adrift when it comes to implementing the directive in a harmonised

way. In what follows, we will highlight some provisions of the directive that might give rise to concern, with a focus on transparency, control on end-use, and the use of general, global and individual transfer licences..

## Transparency

A serious drawback of the ICT directive's implementation is the possible loss of transparency and public control on arms trade. The directive initiates a shift from ex-ante to ex-post controls which might entail loss of transparency at the national level. Whereas national licensing officers used to assess licence applications before transfers of goods took place – in most member states licenses were granted on an individual basis – they will now only be able to check what *has been* traded from their territory to other member states under general and global licenses after these transfers have taken place.

Does this new approach pose a problem? From a governmental point of view, not necessarily. Member states will forego control over what is being traded, but this is in line with the directive's aim to reduce administrative burdens and governmental checks. Moreover, suppliers are obliged to keep records of their transfers (at least for three years) and provide them at the request of the competent authorities. Suppliers must record and store at least information about the nature of the products, the quantity transferred, the name and the address of the customer, (if known) the end use and the end user of the defence-related products, and proof that the customer was informed about the conditions that might be linked to the transfer licence. Licensing authorities will thus be able to gather data on intra-EU trade in defence equipment that takes place from their territory, albeit only after the transfers have taken place.

From a parliamentary point of view, the provisions adopted in the directive are more worrisome. The directive does not contain any prescription on how member states should report to their national parliaments. The European Commission appealed to the principle of subsidiarity for leaving such measures out of the proposal. It is up to the national parliaments to adopt legislation that allows for public and parliamentary oversight. Looking at the European export control regime on dual-use where exporters are equally bound to keep registers of their exports, but no reporting measures to the legislative power are foreseen, the level of transparency is overall rather poor.

Why is public transparency important? First, for reasons of public and parliamentary control of the executive power: arms trade is an important competence in view of conflict prevention. Governments should be held accountable across this field, including for their policy regarding intra-EU trade (“no accountability without transparency”). Secondly, transparency is also a precondition for good-quality legislation. Without a solid structure of coherent and reliable reporting on the activities of the defence industry and governments, any efforts to prepare legislation and monitor implementation can be based only on guesswork.<sup>2</sup>

Even if national parliaments adopt national legislation to ensure public and parliamentary scrutiny, it is very likely that data will be less informative than before, either for reasons of timely publication, or because of the nature of the licences/transfers allows for less information. This decline in transparency on intra-EU trade comes at a time when many governments and parlia-

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2 Surry, E. (2006), *Transparency in the Arms Industry*, SIPRI Policy Paper No. 12, Stockholm: SIPRI, p 6.



ments have achieved considerable improvements in terms of transparency, which makes it especially difficult for parliaments to accept this step back.

Although licences to other member states are hardly ever denied at present, they can still be problematic. Especially when items are being re-exported, intra-EU transfers can also give rise to contestation (e.g. export Belgium – France – Chad). Fears that such transfers will become almost impossible to detect are well-founded.

Even if the decline in national transparency were to be compensated by increased transparency at the EU level about exports from European member states, provided in the yearly COARM reports, this would not solve the problem of accountability. Since exports to non-EU member states remain a national competence, national governments are only accountable to their own parliament(s) for transfers and exports to countries in and outside the EU.

Would it have been possible to attribute a bigger role to the European Parliament? The Parliament could have asked for yearly reports from the European Commission on the implementation of the directive. Currently a report from the Commission to the Parliament and the Council is foreseen, but only on the implementation of the directive (art. 9-12 and 15) by June 2012, and on its effectiveness by June 2016. Reporting schemes based on databases of actual transfers and the resulting exports do not form part of the directive. The management of a detailed database on intra-EU transfers administered by the Commission would depend on receiving reliable, comprehensive and comparable information from all member states. Such a database would be an informative tool for assessing the functioning of the European directive; would be a useful complement to the COARM database of European exports of military equipment; and would stimulate national governments to make public reports available.

In the absence of such provisions in the ICT directive, the importance must be stressed of adopting generous provisions on transparency in national legislation that will allow for public scrutiny of the transfer policy. Such reporting should include details of the nature and value of defence products that are traded under the ICT directive, but should pay special attention to the issue of re-exports to non-EU countries, *inter alia* by reporting on any end-use and export limitations attached to transfer licences.

### **End-use, accountability and the use of export limitations**

A second crucial consequence of the directive concerns the control on end-use and on the final destination of military goods. Today, national licensing authorities examine for each licence application the political situation in the countries of destination to which the military goods will be sent, as well as their end-use. An exporter should specify on the licence application form both the country of the buyer and the country of final destination. The country of the buyer or the initial country of destination is the first country to which the goods are being sent. Often, the first destination of the goods is a defence company in another country, where they will be assembled into bigger weapon systems. Obviously, the defence company is not the final end-user of the goods, and thus the customer for the completed product in which the goods will be integrated – if known – also needs to be taken into account. Under the new export control regime, member states might lose control on the ultimate destination and use of defence equipment transferred to other EU member states that is re-exported from there to a final destination outside the Community.

A watertight European export control system, guaranteeing common standards and a common application of these standards when military goods are exported outside the Community, would offer a valuable alternative to the national control of member states today. However, so far, there is no common European export policy. Even the Commission stated in its impact assessment on the directive that free trade in military goods is politically not feasible: “with a common foreign policy still at an infant stage and uneven levels of trust concerning the watertightness of certain external borders, promoting a licence-free zone would clearly go beyond what is politically achievable in the present context” (European Commission, SEC (2007) 1593). Despite the European common position on arms export, decisions on whether or not to export military goods to destinations such as Israel, Saudi Arabia or Chad vary considerably among member states.

The search for a compromise between stimulating the smooth flow of trade and preserving national control on exports of defence equipment to non-EU countries resulted in article 10 of the directive. This is a remarkable article. It provides the opportunity for member states to attach export limitations to transfer licences: limitations that bind not the re-exporting member state, but the company that wishes to re-export defence equipment. Previous versions of this article proposed consultation between member states in the event that consent to such re-exports was required, but not obtained, from the originating member state. This provision has been erased, which suggests that companies have to abide by the export limitations and that no overruling of export limitations is possible by re-exporting member states. However, the directive does not say anything on the nature of export limitations. Member states might attach a black list of forbidden recipient countries, they might ask to be consulted before re-export, they might prohibit export of any kind,... It is up to member states to decide how they will implement this provision, if indeed they make use of it at all. It is most likely that member states will not be keen to jeopardize the competitiveness of their defence companies. Also the European Commission tends to discourage its use, not only by emphasizing that export limitations are only to be used for sensitive items, but also by not defining what such export limitations could look like, which makes a harmonised implementation more difficult.

Despite its concise formulation, this article holds potential for a huge debate on transfer of responsibility and accountability. Especially for components, possible re-exports will become hard to control. The discussion on re-exports from other EU member states and whether or not to transfer responsibility is already lively today. When the ICT directive enters into force, it will become essential to maintain a thorough control on end-use at the beginning of the production chain, when assessing a licence application. Also for transfer licences to EU Member States, governments should ask for full information not just on the country of destination (an EU Member State) but also on the country of final destination (and final end-user), in case this may differ from the first destination. In this way governments can take both destinations and end-users into account and will be able to decide – based on full information – whether export limitations are needed. Member states should be strongly advised to make use of export limitations for sensitive transfers, preferably by asking for prior approval or at least for consultation with the originating member state before re-export. This would ensure that member states are at least informed of re-exports and may take part in the decision. It would also encourage the harmonization of export control policies. Without a thorough control on end-use by the originating member state, complemented by the option to attach export limitations, export decisions will be centred in member states that host the companies working on systems assembly. This in turn creates the spectre of less public and parliamentary control in the supplier nations and a greater influence for economic pressures, threatening to undermine a balanced assessment – taking full account of the criteria in the Common Position on arms exports - of export licence applications for the final

product. Such a development may be attractive from an economic point of view, but also risks underplaying the security threats. We have not yet reached the stage where full confidence in the export control policy of all member states can be endorsed. A system of checks and balances for arms export controls - not only for denials, but also for approvals - is therefore to be welcomed.

### The EU list of military equipment and the use of general, global and individual licences

Finally, it remains unclear how member states will make use of general, global and individual licences. What items will be transferrable under general, global and individual licences and what will be the consequences if the use of these differs considerably among member states? The lack of guidelines to member states impedes a harmonised implementation. Possibly the European Commission was envisaging a gradual process in which member states could introduce the use of general and global licences at their own pace. Nevertheless, this non-harmonised system undermines the goals of the directive in terms of simplification of procedures and convergence. A system of 'community general licenses' such as known for dual-use items is an option that deserves further exploration.

### Conclusion

The ICT directive marks a transformation in member states' attitude towards arms trade. Arms trade used to be at the core of national security policy. Defence equipment was perceived as an exceptional trade good, to be exempted from the functioning of the common market by means of art. 346, former art. 296 of the TEC. Not only for the protection of their security, but also for economic reasons, member states made use of this Treaty provision to apply protectionist measures.

In a context of shrinking defence budgets, the increasingly transnational nature of the defence industry and the need for a more efficient production process, the European Commission took the initiative to set up a simplified European licensing system. Lower trade barriers for intra-community trade have not, however, been matched in the process by stronger rules to prevent destabilizing arms exports to non-EU countries. There is a spill-over effect to the export control policy of member states, but instead of strengthening control at the EU's outer borders, the ICT directive seems likely to have a liberalizing effect on exports. For example, some member states have contemplated applying the EU licensing system (with global and general licenses) also to trade with non-EU member states, or removing control on export of military items that are not on the EU list, or transferring responsibility for exports to other member states. The effects of the directive may therefore go beyond its intended goals of internal liberalization, as and when the tendency to apply the lowest possible common denominator for transfer controls triggers a process of loosening control on arms exports to third countries.

The initiatives of the Commission to create a common European defence market implying lower internal trade barriers were hardly contested by a civil society that had for years been advocating more European cooperation on arms export control policies. Unfortunate cases of European exports to conflict-prone areas have made clear, however, that member states may undermine the effectiveness of each others' export control policies. A chain is only as strong as its weakest link. Thus while the economic efficiency hoped for from this directive could hardly be opposed (and indeed it stimulates more harmonization), more free trade within the EU should be backed by common controls at the outer borders. Efforts for the harmonization of export control policy

under CFSP deserve acknowledgment; but they have been overtaken by economic measures to strengthen the defence market. Since economic considerations should not outbalance security concerns, an implementation of the directive is called for that fully acknowledges the risks and responsibility inherent to arms exports.

# Concluding remarks: Effective security and responsible trade

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The market for defence products is a global market and European defence products are sold in many parts of the world. SIPRI's top 10 of largest arms-producing companies in 2008 includes four European companies. Together, European member states exported defence equipment to a value of 40,3 billion euro in 2009, of which three quarters was destined for customers outside the EU.<sup>1</sup> Germany, France and the United Kingdom were responsible for 23 % of total EU arms exports between 2005-2009.<sup>2</sup> Discussions about the rationale for a Europe-wide defence market or a shared European position on arms export control should thus take the wider global picture into account.

Strategic aspects of arms trade are important when discussing the motivations for maintaining an arms export control regime. A classic formulation reads: "There can be no assurance that the weapons we and our allies make available to our friends today will not be used against us tomorrow."<sup>3</sup> On the other hand defence companies typically – and increasingly - depend on cross-border cooperation and foreign markets. When these economic and security aspects are addressed from a European perspective, the picture invariably becomes complex and interesting. In order to appreciate the underlying tensions in the relationship between defence production, arms trade and arms controls in the EU, a number of aspects deserve attention.

## I.

What are the characteristics of a defence market? A market brings buyers and sellers of goods and services together. Sellers of defence material supply governments with products to provide hard security. The nature of the goods and the buyers are specific to a defence market. As a market the defence market follows the rules of demand and supply, and increasingly so as it has largely been privatized. Still, information is not disclosed to all participants in it and national security considerations invariably play an important role, often trumping pure economic arguments. In short, the matching of buyers and sellers is subject to peculiar preconditions. The defence market can to a large extent be defined as a model for imperfect markets.

Throughout history, nation states have found it very important to gain a competitive advantage in the area of defence. The strategic importance of military material or technology that could be used in military operations was deemed of vital significance. States have thus exempted military goods and services from market logic. Throughout the period of the Cold War, massive amounts of public resources were devoted to R&D and procurement in the armaments race between the

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1 Duquet, N. (2011), *Flemish foreign arms trade 2010*, Brussels: Vlaams Vredesinstituut, p. 27.

2 SIPRI, (2010), *SIPRI yearbook 2010: Armaments, disarmament and international security*, Oxford: Stockholm International Peace Research Institute.

3 U.S. Congress, Office of Technology Assessment, (1991), *Global Arms Trade: Commerce in Advanced Military Technology and Weapons OTA-ISC-460*, Washington, DC: Government Printing Office, p. 17.

Western and Eastern power blocs. Defence spending was also considered a useful instrument for employment policy. Use of offsets - additional compensations given to a buyer by a seller - was a customary ingredient of defence procurement contracting.

In 1989 the context and premises of defence procurement changed substantively. Political support for high levels of defence spending was shrinking. The absence of the old power bloc logic with its concomitant armament policy meant that considerations of cost effectiveness – good performance and avoiding duplication – became more important. Military procurement became increasingly geared towards the maintenance of operational capacity. At the same time, the defence industry became increasingly privatized and transnational in nature. These developments pose challenges for controlling the export of strategic goods.

## II.

The need for export controls is most easily understood when thinking of embargoes – the partial or complete prohibition of trade with a particular country. In times of war embargoes represent an economic dimension of warfare and strategy. The aim is to prevent the enemy from obtaining goods or materials that would strengthen their war efforts. This is export control at its purest and simplest: prohibit the delivery of goods to an identified enemy. Whereas control could in principle be exercised over all goods, there is a strong imperative for international trade. Therefore, more refined approaches only target strategically sensitive products of a military or dual use nature. While it is tempting to see arms export controls as a hindrance to the economic imperatives of a market, one should keep in mind that export regimes also facilitate trade in strategically sensitive goods between those states that trust each other.

Today's most important multilateral export control regime, the Wassenaar Arrangement, is a successor to the Coordinating Committee for Multilateral Export Controls (COCOM), established in 1949 to prevent the delivery of strategically sensitive material – both military and dual use - from members of the Western NATO alliance to the members of the Warsaw Pact. After the end of the Cold War arms export controls became increasingly focused on the proliferation of Small Arms and Light weapons (SALW). The high price paid by many civilians in countries plagued by civil war was increasingly recognized at the international level. This shift in focus from strategically sensitive goods to SALW was accompanied by a shift in attention with regard to buyers. Formerly, states had been the main protagonists of concern when it came to the proliferation of arms, but now there was increasing attention to non-state actors. Following the events of 9/11, the focus on non-state actors as potentially problematic end users has remained: now with the added apprehension these might develop weapons with mass destruction capability.

This underlines the fact that both realists and idealists have cause to care about controlling the export of strategic goods. Realists care because they value their own security. Idealists care because they think security is important to everyone, everywhere in the world. The demand for security is a global one. Security is a global public good, and this explains why it is mainly government that buys defence products with public funds. As security is a public good, this also implies a responsible attitude on the part of governments, notably in arms exporting countries.

### III.

Here emerges an interesting tension that gives rise to a policy dilemma. The nature of the international arms business clearly entails two issues of concern: controlling the proliferation of weapons and security technology, on the one hand, and safeguarding the performance of a defence market on the other. Efforts to control proliferation will almost certainly limit the international sales of the defence-related industry. Similarly, efforts by these companies to expand their share of the market will exacerbate the problem of proliferation.<sup>4</sup> How does this play out in a European context?

Governments take responsibility for their citizens' security. In the realm of international politics this implies the maintenance of a defence posture and a credible defence capacity. In many regards defence is considered a classic cornerstone of sovereignty. Broader strategic concerns often result in cooperation between governments, increasingly on a multilateral basis, but sovereignty and defence remain a preciously guarded state privilege. Cooperation between Western European states has matured into the formation of a comprehensive security community thriving on long-term shared interests, some cultural affinity and solid institutional arrangements. As a European community, the EU has become a self-aware actor in international politics, as first exemplified in its trade policies. It has matured as a security community to a point where the maintenance of a credible defence capacity has become a common European cause. It should still be stressed that the territorial defence of Europe remains guaranteed by NATO. Nevertheless, the EU now formulates a Common Security and Defence Policy (CSDP) as a major element of the Common Foreign and Security Policy (CFSP). Military activities under the European umbrella are geared towards peacekeeping and crisis management in third countries.

For a long time, the logic of the common market was not welcome in domains where national security interests prevailed, and the consensus on the primacy of sovereignty over market in issues of national security was enshrined in article 296 of the EC Treaty. This meant that defence procurement and export control for strategic goods remained a member state prerogative - prerogative jealously guarded from market deregulation, for reasons explained above.

Following the trends of privatization and increased cross-border interaction in and between transnational companies, pressures mounted against the old prerogatives and protectionist reflexes. There was a need strongly felt by many involved to create a European 'level playing field' that would boost a Europe-wide defence industrial base. In its communication of 2007 in support of the adoption of a so-called 'defence package' the European Commission was outspoken: "The strategy presented in this Communication will create better conditions for Europe's defence industry to prepare for future challenges by increasing its competitiveness, promoting innovation, and building upon existing strengths, creating a fairer market place, and preserving and creating high quality jobs. This strategy is designed to ensure that Europe's defence industry can deliver the best capabilities for the ESDP".<sup>5</sup> In order to facilitate the development of a European defence equipment market, two directives were adopted in 2009: one simplifying terms and

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4 S. Congress, Office of Technology Assessment, (1991), *Global Arms Trade: Commerce in Advanced Military Technology and Weapons OTA-ISC-460*, Washington, DC: Government Printing Office, p. 18-19.

5 Commission of the European Communities (2007), *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A strategy for a stronger and more competitive European defence industry*, COM (2007) 764 final, Brussels, 5.12.2007.

conditions for transfers of defence-related products within the EU, and the other on procedures for the award of certain contracts in the fields of defence and security in the EU.<sup>6</sup>

The success of this undertaking shows that the European Commission is not only an actor of strategic importance, but also that it is becoming a strategic actor. As a comprehensive security community, it makes sense to facilitate the trade of strategic goods within the community and to get rid of the red tape implied in national licensing procedures. From the perspective of the EU – especially the administrations or agencies concerned with affairs internal to the EU – it makes sense to open up national defence markets in order to boost the performance of defence industry across the whole community. The defence package offers a comprehensive European approach to handling the defence market/export control nexus *within* the EU. It is a European approach that provides a central executive role for the member states. But something is left out of the picture: the fact that the market for defence and security goods is a global market. And while the Commission is correct in assessing the problems currently existing within the EU and also consistent in its proposed remediation, it does not talk about the tangible implications of its proposals beyond the EU's borders. Again, the market for defence products and services is a global market. It is often assumed that EU governments will be the principal buyers of goods in an EU defence market; but shrinking defence budgets within the EU have driven and will continue to drive European defence companies to be active on foreign markets. Increased exports of arms to third countries are a likely consequence. Third countries will thus be among the recipients, and this necessitates a look at export controls.

With regard to arms exports *outside* the EU, the need for collective controls on the proliferation of arms began to be acknowledged in the nineties. As members of a community, Member States undertook to harmonize their policy with regards to arms transfers to third countries by defining common standards for decisions on export licences. Hence the EU Code of Conduct was adopted by Member States in 1998 in order to harmonize policies and prevent undercutting. Its scope of application was further defined in the common Military List of the European Union defining relevant products, components and technology. In 2008, the Code of Conduct was upgraded to a Council Common Position defining common guidelines governing the control of exports of military technology and equipment. This new policy document defines the parameters and scope for dealing with the external dimension of the European defence market, and is designed to inform judgements made when granting licenses for arms trade with third countries. Licensing decisions remain a Member State prerogative but are to be assessed with the EU criteria in mind.

Thus, Europe is addressing both the inner and the outer dimension of its defence market, but it is interesting to note that it does so in a different regulatory ways: 'hard' on the inside, and 'soft' with respect to the outside. This somewhat enigmatic characterization refers more particularly to the regulatory means used. Joint policy on defence procurement and arms trade liberalization within the EU is being shaped via legally binding and directly applicable directives of the EU,<sup>7</sup> which are to be brought into force by end of June 2012. You can call this hard law, and it will be enforceable by the courts in future. On the other hand, the European instrument that regulates the control of arms exports beyond the external borders of the EU is a CSFP decision where the

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6 Depauw, S. (2010), *The Common Position on arms exports in the light of the emerging European defence market* Brussels: Flemish Peace Institute.

7 Art 288., §3, TFEU, "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods", Official Journal of the European Union, 2008, p. C115/172.



binding effect is much less direct and tangible.<sup>8</sup> This is a much softer kind of regulation whereby Member States agree to align their position, making enforceability more a question than a premise.

#### IV.

The link between the inner and outer aspects of the European defence market will be provided by the Member States. It will be the executive authorities of member states that bridge between the internal and external markets with their policies and case-by-case decisions. If the EU is to be seen as a comprehensive security community with common criteria for assessing applications for arms export licenses, this implies a shared responsibility on the part of its constituent Member States. Their policy considerations can no longer be limited to national security priorities or the national interest. Preventing proliferation is a classic issue for collective action, demanding a uniform implementation. This implies that the imperatives of trade and security should be correctly defined and compared. Balancing effectiveness and responsibility in such a way involves many challenges for national decision makers.

Transfer of military material within the EU does not pose a direct security risk: thus licensing requirements are being simplified and a shift from ex-ante to ex-post control is envisioned for most transactions within the EU. Trade in defence material within the EU may be expected to intensify. When arms and advanced weapon systems are sold outside the EU it will again be the individual Member States that will be responsible for guarding the 'frontiers of Europe'. The common position has laid down a set of criteria for assessing license applications. When it comes to norm-setting in a context of interest-based bargaining, however, the pull towards the lowest common denominator is very strong. One could indeed expect a harmonized policy on the basis of shared principles, but the discretionary power of the executive remains largely untouched. An inadequate export control policy by some member States could pose serious risks for the objectives of CSFP and would surely undermine the EU's normative power rhetoric. As noted earlier, it is in the very essence of arms export control regimes to have a dual nature. Granted, they inhibit free trade in goods, but by doing so they also facilitate the trade of strategically sensitive material among those who trust each other. If this dual nature is recognized, the imperative becomes to strive for effectiveness in a responsible way and to be responsible in an effective manner.

Security is a public good and providing security remains a vital function of government, for which it should be held accountable. From the perspective of the European citizen, the challenge for any given government is to provide for public scrutiny in this area. Democratic control over foreign affairs and matters of defence is not self-evident. There is a long history of excluding these matters from the public realm, so as not to compromise national security. Nevertheless, many European citizens have seen transparency on arms exports increase through the development of national reporting to their parliaments during the last decades. In some Member States it was the EU Code of Conduct that played a significant role in creating the space for public discussions on the appropriateness of certain arms exports to third countries. The new licensing arrangements for intra-EU trade will remove many intra-EU movements of goods from the public radar. The task devolves on national parliaments to stay attentive to EU exports to third countries. What is more, the growing European dimension of the defence market and export control policies

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<sup>8</sup> Art 29., TEU, *"The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions."*, Official Journal of the European Union, 2008, p. C115/33.

warrants further reflection about creating formal reporting mechanisms vis-à-vis the European Parliament on the destinations and end-users of European military material.

Making a sound assessment on whether the balance between effectiveness and responsibility is healthy demands an informed judgement. “Public discussion of armaments issues and the regulation of the companies involved is impeded without this solid basis of information from which to launch a discussion.”<sup>9</sup> The judgement on the balance between effective security and responsible trade is a political issue, which ultimately belongs in the public sphere.

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9 Surry, E. (2006), *Transparency in the arms industry*. SIPRI policy paper No. 12., Sweden: Ingeniörskopia, Bromma, p. 39

# Afterword: what's next?

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As a long-term partner of the Flemish Peace Institute and as the incoming Chair of its Scientific Advisory Council, I would first like to commend the Institute not only for organizing the conference in November 2011 on which this publication is based, but for selecting the issue of the Flemish and European defence industrial regime as one of its main research pillars in a multi-year perspective. The European defence industry, as most lately stressed in Tomas Baum's conclusions above, is increasingly a matter of common responsibility and indeed of shared profit, as many if not most major equipments are produced on a collaborative basis. Yet the amount of national and collaborative research devoted to the many issues arising, though increasing, still seems to lag behind the dynamics both of the market and of executive policy development.

A tradition of confidentiality – among firms as well as governments – and the limited provision for democratic oversight certainly go far to explain this. Another factor, however, is a general tendency in arms-related security research, especially since the end of the Cold War, to focus either on Weapons of Mass Destruction or on small arms and inhumane weapons. Both of these are issues of key importance and both carry a supreme ethical loading: but they are not about the weapons that most often win actual wars, nor are they the branches in which private industry makes most of its profit or where most of a nation's defence budget is spent. Security and economic reasoning alike suggest paying at least a modicum of attention also to what we rather ironically call 'conventional' weapons, including those used in internal security as well as external defence, and to linked technological developments.

Further, the topic is one that lends itself to research at a sub-national level and within the realm of theory and practice involving non-state actors, which has come so much into vogue – but still has some way to go towards maturity – following the events of September 2001. Much arms production in OECD states is privatised, much relevant R+T work is done by privately funded experts, and sales by and to non-state actors are an increasingly significant, if often problematic, part of the picture. The economic impact of defence production is local and regional as well as national and can show interesting variations within the state, the contrasting profiles of Flanders and Wallonia being a relevant example. Useful and, indeed, distinguished research achievements are thus very much within the reach of institutes and experts with a less-than-national remit, as seen in the work of the FPI itself.

The title and topic of the present publication point to a further gulf that needs bridging, between expertise on arms production, and expertise on the restraint of armaments and their proliferation. In this case we are looking at restraints on trade in defence-related equipment and especially on transfers outside the EU area; but the disciplines of arms control, disarmament and non-proliferation (for WMD and dual-use items) form a third side of the triangle that also has its impact on production dynamics. It is clear how international efforts to curtail the spread of WMD-related objects and knowledge have directed attention back to the civil industry and, notably, called for stronger 'fire-walls' between legitimate business activities and deliberate or accidental leakages to proliferators. However, arms control and disarmament also affect the environment for the 'conventional' defence business when they lead to whole categories of products (judged inhumane) being prohibited, or they put a premium on equipment that can be easily

and safely destroyed, or – one might add more cynically – when the agreed elimination of outdated items, which the forces can manage without, opens the way to marketing new techniques for analogous purposes.

An attempt to chart comprehensively what ‘responsibility’ means in relation to the defence industry would not stop there. There is a whole set of issues about avoidance of corruption and fair trading, including the frequency of major cost overruns on defence projects and how to avoid them. Following on from the challenge of stopping WMD proliferation is the question of how far the industry should, and should be made to, hold itself back from investigating other new technologies that could produce massively destructive, inhuman and indiscriminate results. (This seems an issue badly overdue for attention in the European setting, when the Commission is investing such substantial funds to promote research and innovation in related fields.) Last but not least, the USA has been leading the way - and Europeans somewhat belatedly starting to follow - in relating defence activity to the need for mitigation of climate change: seeking approaches both to production and operations that draw less upon, and do less damage to, non-renewable natural resources. The case for stepping up independent critical research in these areas is all the stronger given that most of them are not yet routinely included in business’s own definitions of Corporate Social Responsibility.

Several of the contributions to this publication stress the need for transparency and democratic control in all that concerns the arms trade, and discuss the challenge of maintaining and improving current levels of public reporting in the new environment created by EU defence market legislation superimposed on longer-term globalizing and transnational trends. It might be added that the whole field of internal security equipment and multi-purpose technologies, explored in Jocelyn Mawdsley’s contribution above, remains largely a blank area on the map in terms of media attention, NGO activity and parliamentary oversight alike. Here too, good research is invaluable, as there is little point in a parliament trying to probe and judge a government’s performance in managing the whole arms cycle if it has nothing but the government’s word to go on. The role that the FPI itself plays alongside the Flemish Parliament is an intriguing and productive model in this context.

However, it also needs stressing that true European transparency in this field demands one of two things, and ideally both: a brief of oversight for a collective representative body, and/or determined networking among national and regional parliaments and among the experts who support their scrutiny. However hard individual governments and producers may try to compartmentalize their practice, so as to maintain a residue of sovereignty and protect special national interests (of both the liberalizing and restrictive kind), in modern conditions a piece of information released anywhere in Europe can and should be shared in real time with the whole community. Such transnational revelations have already helped those campaigning for better answerability and openness in states performing below the EU average in export restraint. More of the same should be an obvious prescription for all those preoccupied with the uncertainty, the wide range for variation, and the possible loopholes for abuse attaching to the implementation of new EU defence market measures from 2012 onwards.

If this is an easy recommendation to make looking forward, it is not so easy to formulate others at a point in time when all factors seem variable *par excellence*, and where externalities are also so powerful. As Herbert Wulf puts it most clearly, one can hardly define the impact of a common European arms policy on CFSP and/or CSDP when it is questionable how far any of those things really exists. Further, not only is the EU’s own governance constructed in such a way that a com-

*bined* policy reflection on both topics is practically impossible (and critiques of each all too easily peter out into grumbling about member states), but it is far from certain that anyone else out in the world subjectively integrates them when thinking about the importance or the ‘values’ message of Europe. How many regions could one find where the leading states rely for their survival in no small part on weapons bought from Europe, including collaborative products, but enjoy dismissing Europe collectively as a military pigmy? If they are aware at all of European efforts for restraint, may they not be mostly conscious of EU lobbying for an Arms Trade Treaty at the UN and thus judge the European line as over-idealistic if anything? The point here is that European defence (and dual-use) products reach and play a role in certain parts of the world; CSDP missions and other EU efforts at transformative security work are directed largely towards other parts; and EU stances on various aspects of weapon control take effect in a specialized dimension of ‘control governance’ where nations line up according to yet another set of group memberships and national attitudes. Thus the global setting, as insisted on by Tomas Baum, is certainly essential for a mature view of this topic but does not itself speak with any single clear voice.

Ultimately, Europeans must start from home in surveying the impact and coherence of their own instruments; and they would be well advised to do so in a perspective that looks wider than rules and institutions. The more critical pieces in this collection share a concern that defence market regulation allowing easier goods transfers within the EU has ‘got ahead’ of export control policies that still rely on national, probably variable, enforcement of controls on transfers beyond the EU boundary. The same hypothesis could be expressed in two other, broader ways: first, that the Commission-drafted market directives directly affect the legal/ financial environment for enterprises and can hardly be ignored by them, while CFSP-based export controls and indeed the EDA’s work rely ‘only’ on national governmental execution and have been known to provoke ill-concealed business scepticism. Secondly, that economic benefit is being given precedence over (external) security concerns at a time of economic crisis – hardly surprising, if we acknowledge that under modern definitions economic welfare and viability is also a dimension of security, and moreover one crucial for the EU’s comparative global standing.

All these versions probably convey a truth, but they coexist with real-life dynamics pointing in more varied directions. At the FPI’s November 2010 conference for instance, participants were buzzing with speculation over the just-signed Franco-British Defence Treaty – was this a symptom of (bilateral) re-nationalization of defence planning, or could it boost a more practical and determined road to ‘real’ European collaboration through specialization? What is intriguing for the present topic is that on either view, the Treaty showed governments stepping back into the fray and directing their companies to work in ways that were essentially dictated by public imperatives, financial and strategic alike. It hinted that a time when funds are short and publics war-weary is not a time when the private market is likely to be allowed to run off and do whatever it chooses, at its own price. Globally, there is quite a solid consensus that the experiences of autumn 2008 onwards have tilted the balance back towards active state intervention in, and adapted/extended international governance of, the free market. The story of the EU’s own current Euro-crisis underpins this in many ways. In short, what governments concede to the free play of economic forces with one hand they are still capable of taking back – directly or indirectly – with the other; and the flow of history, above all in our own continent, seems to be driving them towards seeking collective ways of maintaining their grip despite the lurid streaks of nationalism running the other way.

This is still beside the point for the present purpose because the question is what the EU governments, singly and together, will use their much-embattled public powers for: preferentially to boost defence production and exports, or to strengthen a common ethical foreign and security

policy and iron out at least some of its contradictions? The only honest answer is that we cannot know. We can and should however lobby all the relevant players if we have a clear view on it ourselves; and we should look for the big events (or elephants in the room) that may ultimately sway both state and business practice more effectively than any number of procedural adjustments. The still to be completed fall-out of the general economic crisis is one, the literal fall-out from Fukushima another (with its impact on the whole nuclear and thus the dual-use sector), the manifold defence lessons of violence in North Africa and of the whole Arab Spring a third, and there are no doubt more and even bigger 'black swans' still to come. Against this canvas, the present publication cannot go further than scratching the surface of the whole issue-nexus but at least it scratches it professionally, carefully and quite deeply. May it help to provoke much further debate and enquiry by the FPI itself, its partners in this venture, and all who care about defence, the EU, good governance, and peace.



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